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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 406.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLcott, ET AL., PLAINTIFFS IN ERROR,

v.s.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JUNE 30, 1897.

(16,619.)



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BLEED THROUGH

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Caption.

THE STATE OF TEXAS, }
County of Nolan. }

At a term of the district court begun and holden at Sweetwater, within and for the county of Nolan, before the Hon. Wm. Kennedy, and ending on the 22nd day of April, A. D. 1893, the following case came on for trial, to wit :

THE STATE OF TEXAS
vs.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FRED-
 ERICK P. OLcott, and GEO. E. DOWNS.

Plaintiff's Original Petition. Filed Feb. 3, 1890.

In the District Court of Nolan Co., April Term, 1890.

THE STATE OF TEXAS
vs.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FRED-
 ERICK P. OLcott, and GEO. E. DOWNS.

To the honorable judge of said court :

The State of Texas, hereinafter styled plaintiff, comes now, by its attorney general, J. S. Hogg, who acts by lawful authority of law herein, complaining of The Houston & Texas Central Railway Co., Frederick P. Oleott, and Geo. E. Downs, who will hereinafter be styled defendant, and alleges, avers, and charges :

1. That the Houston & Texas Central Railway Company is a railroad corporation, duly incorporated and acting as such under the laws of Texas, and has its domicile and general office at Houston, in Harris county, said State; that said Frederick P. Oleott and Geo. E. Downs are resident citizens of the county of Kings, State and city of New York.
2. That the plaintiff is now and has always been the owner in fee-simple and is now and has always been entitled to the possession, use, and enjoyment of sixteen sections of land, of 640 acres each, situated and lying in the county of Nolan, State of Texas, in that certain block of Houston & Texas Central Railway surveys known as block No. 64; all of which are more particularly described and designated by the following tabulated statement, showing the number of each certificate, the date of its issuance, the name of the grantee, the date of its location and survey, the county in which located and surveyed, the number of acres called for in each certificate, the date of its return to and file in the general land office, the name of the land or surveying district in which located, the file number, the number of miles of main track and the number of miles of sidings called for in each certificate and for which it was issued, the section or survey number, and the block number, as follows, to wit :

Number of cert. utilicate.	Date of cer- tificate.	To whom issued.	When located and surveyed.	County where located.	Number of acres.	Date of return to & file in the general land office.	District in which located.	File number.	Miles of railway.	Survey No.	Block No.
									Main track.		
38/4438	July 1, 1872	Houston & Tex. Cen- tral Ry. Co.	June 7, 1873	Nolan...	640	Nov. 20, 1873	Bexar...	5503	931 $\frac{1}{2}$	2 $\frac{1}{2}$	169
38/4443	"		"	"	"	"	"	5508	"	"	191
40/4997	"		June 1, 1873	"	"	"	"	5386	"	"	199
40/4998	"		"	"	"	"	"	5387	"	"	201
40/4999	"		"	"	"	"	"	5388	"	"	203
40/5001	"		"	"	"	"	"	5390	"	"	207
40/5002	"		"	"	"	"	"	5391	"	"	209
40/5003	"		"	"	"	"	"	5392	"	"	211
40/5004	"		"	"	"	"	"	5393	"	"	213
40/5005	"		"	"	"	"	"	5394	"	"	215
40/5006	"		"	"	"	"	"	5395	"	"	217
40/5019	"		"	"	"	"	"	5317	"	"	243
40/5020	"		"	"	"	"	"	5518	"	"	245
40/5021	"		"	"	"	"	"	5519	"	"	247
40/5022	"		"	"	"	"	"	5520	"	"	249
40/5023	"		"	"	"	"	"	5521	"	"	251

4 3. That each of the foregoing described and enumerated land certificates was issued to and in the name of the Houston & Texas Central Railroad Company at the time and for the purposes indicated in the foregoing statement and *were* by said company, at the time indicated therein, located and surveyed upon the lands in controversy and *were* returned to and — now on file in the general land office, but that no patent has been issued on either of them ; that by reason of said location and surveys defendants herein have unlawfully entered upon and taken possession of said lands, ejecting plaintiff therefrom, and now unlawfully withhold the same from plaintiff's possession, to plaintiff's damage.

Wherefore plaintiff brings this suit and prays judgment of the court giving its possession of the aforesaid premises and declaring the title to the same to be in plaintiff, and for damages and costs of suit.

4. Plaintiff further alleges, charges, and avers that each and all the said certificates hereinbefore described were issued to the Houston & Texas Central Railway Company on the respective dates indicated in said tabulated statement by the commissioner of the general land office of the State of Texas without authority of law and are null and void.

5. That all of said certificates were issued upon and for the construction of that portion of the Houston & Texas railroad extending from Brenham, in Washington county, to Austin, in Travis county, which was constructed, completed, and put in running order on or about Feb. 21st, A. D. 1872.

6. That at the time of the construction and completion of said portion of said road as above set forth and at the time of the issuance of said certificates as hereinbefore alleged there was no law, general or special, in force in the State of Texas authorizing or permitting the issuance

of land certificates to the Houston & Texas Central railway
5 5 in any quantity or for any purpose whatsoever, and plaintiff here charges and avers that the action of the commissioner of the general land office in issuing and delivering to said Houston & Texas Central Railway Company said land certificates and permitting them to be located and surveyed upon the lands hereinbefore described and returned to and filed in the general land office of the State was, as before alleged, had and done wholly without authority of law and in plain violation of the constitution and laws of the State of Texas in force at the time.

7. That each of the said certificates recites upon its face that it was issued for the construction and completion of ninety-three & $\frac{13}{17}$ ths miles of main track and two & $\frac{35}{66}$ ths miles of sidings between the said points of Brenham and Austin.

8. That the aggregate number of miles of sidings, as shown upon the face of said certificates and for the construction of which said certificates were in part issued, is two miles and 2,800 feet ; that there was issued to and received and located by said railroad company land certificates at the rate of sixteen sections, of 640 acres each, for each mile and fractional part of a mile of said sidings in addition to a like quantity received and located by said company on ac-

count of said main track ; that said sidings were at the time of their construction and have been ever since that time necessary appurte-
nances and adjuncts to and parts of said railroad and were and are
essential to the use and operation of said railway ; that said railway
at no time was or could have been complete and in good running
order without said sidings ; that without them said road was not
substantially built or fully equipped for the transportation of pas-
sengers or freight, nor would said road without them have been
constructed in accordance with the provisions of said railway
6 company's charter or the general laws in force in this State
regulating railroads.

9. That there was not at the time of the issuance of said certifi-
cates nor at any time prior or subsequent thereto any law, general
or special, in force in this State authorizing the issuance of land
certificates to said railway company for or on account of the con-
struction of sidings ; that it cannot be ascertained from the face of
said certificates or from the location or survey of said lands or by
any other means which of said certificates were issued, located, or
surveyed exclusively on account of the construction of sidings and
which were issued, located, or surveyed exclusively on account of
the construction of main track of said railroad.

10. That each and all of the said certificates were by their express
terms and conditions to be located only upon the unreserved, vacant,
and unappropriated public domain of the State of Texas ; that in
violation of said terms and conditions and of the laws of this State,
and also of a special law entitled "An act to adjust and define the
rights of the Texas & Pacific Railway Company within the State of
Texas, in order to encourage the speedy construction of a railway
through the State to the Pacific ocean," passed on the 2nd and
which took effect on the 21st day of May, 1873, the said defendant
company, on the respective dates, as shown by the tabulated state-
ment, as hereinbefore set forth, did locate and have each and all of
the aforesaid certificates located and surveyed upon the reserved
and appropriated public domain described within said act, which is
here referred to and made a part hereof ; that the lands so located
by the said defendant company were a part of the lands appropriated,
reserved, and set aside by sections five and six and other provisions
of said special law for the benefit of and accepted by the said Texas
& Pacific Railway Company and the State school fund, and
7 were by said act withheld and reserved from appropriation,
location, and survey, except for the said expressed purposes,
until the years 1876 and 1880 respectively, as therein provided, and
since said dates have by the general laws of the State continued to
be reserved from location and survey by any and every class of cer-
tificates.

11. That by reason of the unlawful acts of said railway company
in obtaining and holding the aforesaid certificates and in locating
them upon the State's said appropriated and reserved public domain
it holds out to the world that it has some kind of title to the afore-
said-described property, and in that way a cloud is cast upon the
State's title to the same.

Wherefore the State prays for judgment of possession of and title to said land, for a decree cancelling each of the said certificates hereinbefore described, and also removing the clouds cast upon her title by the location and survey of the same upon the lands hereinbefore described, and for damages, costs, and for general and special relief.

JAS. S. HOGG,

Atty Gen'l, and

R. H. HARRISON, *Assistant,*
For the State.

Endorsed as follows, to wit:

No. 269. The State of Texas vs. Houston & Texas Central Railway Company, Fred. P. Olcott, & Geo. E. Downs. In district court, Nolan county. Plaintiff's original petition. This action is brought as well to try title as for damages. Filed February 3rd, 1890. John C. Cox, clerk district court, Nolan county, Texas.

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Plaintiff's First Supplemental Petition.

Filed March 30, 1893.

In the District Court, Nolan County.

THE STATE OF TEXAS }
vs.
F. P. OLcott et al. }

The State of Texas, plaintiff herein, with leave of the court, file this the 1st supplemental petition.

The said plaintiff says that the second amended original answer of defendant, heretofore filed in this court on March 30th, 1893, is insufficient in law, and of this prays the judgment of the court.

Replying to said amended answer, the plaintiff denies all and singular its allegations therein and demands strict legal proof thereof.

Replying specially thereto, the plaintiff represents and avers:

1. The plaintiff denies that defendants filed upon the land in controversy prior to the passage of the act of May 2, 1873, as alleged, but plaintiff avers that if any such file was made it was abandoned and the same renewed on the 28th day of July, 1873, and no survey of the land and no return of field-notes were made thereunder.

2. The plaintiff denies that the defendants company completed its road in the manner and at the time required by law. On the contrary, plaintiff avers that on the special act of Sept. 21st, 1866, which superseded all other laws as to said company, provided, among other things, that said company should construct and put in running order a section of 25 miles of additional road to that then built within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land thereby made should be discontinued when said company should fail to construct and complete at least 25 miles of the road contemplated

by the charter each year after the construction of said first-mentioned
 9 fifty miles, yet said defendant company failed to comply with
 said act as to the construction of the road and said land was
 discontinued and said certificate involved in this suit was
 issued in violation of law.

3. The plaintiff denies that the defendants are entitled to the
 certificates in suit under the alleged special act of August 15th,
 1870, because, among other reasons—

(A.) The said act was never enacted into a law by the legislature
 of the State of Texas and from that time until the present it has
 been repudiated by each and every executive of the State and each
 and every one of said executives have refused to recognize or be
 bound thereby.

(B.) Said act does not grant to defendant-land for the construc-
 tion of the road from Brenham to Austin, and if it can be or is
 so construed it is in that particular in violation of art. 10, section 6,
 of the constitution of 1869, and the certificates were issued contrary
 to law.

(4.) The plaintiff specially denies that defendant company was
 authorized to build the road from Brenham to Austin by any law
 of this State until the alleged act of August 15th, 1870, if then, which
 is denied, and it denies that it was entitled to any land grant for
 building said road prior to said pretended law.

(5.) The plaintiff alleges that the road from Brenham to Austin
 is a branch of the main line of the defendant company's road, and
 by the act of January 30th, 1854, and other laws applicable to said
 company it is expressly provided that railway company shall not
 receive land for branch roads.

Wherefore the plaintiff prays as in the original petition.

C. A. CULBERSON, *Att'y Gen.*

Endorsed as follows, to wit:

10 No. 269. The State of Texas vs. Olcott et al. 1st supple-
 mental petition. Filed March 30th, 1893. John C. Cox,
 clerk district court, Nolan county, Texas.

Defendants' Second Amended Original Answer.

Filed March 30, 1893.

In District Court of Nolan County, Texas.

THE STATE OF TEXAS
 vs.
 THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY et al. }

Now comes the defendants The Houston and Texas Central Rail-
 way Company and F. P. Olcott, and, leave of the court having been
 had and obtained, file this their second amended original answer in
 lieu of their answers filed therein on the 31st day of March, A. D.
 1892, and in lieu of all other pleadings filed by them herein, and
 for amendment saith—

THE STATE OF TEXAS.

That the defendants The Houston and Texas Central Railway Company and Frederick P. Olcott say that Charles Dillingham is the receiver of said railway company, duly appointed by the honorable the circuit court of the United States in and for the fifth judicial circuit and eastern district of Texas, in possession of the property and lands sued for in the above cause, and authorized by said court to defend this cause for and on behalf of and in the name of the said railway company, and for plea to the jurisdiction of this honorable court say—

That said Houston and Texas Central Railway Company and all its lands, franchises, and properties of every nature and description whatsoever were at the time of the institution of said suits against it and long prior thereto and ever since have been and still are in the possession of the honorable the United States circuit court for the eastern district of Texas, through its receivers; that the same were placed in the hands of Charles Dillingham,

Nelson S. Easton, and James Rintoul, as joint receivers, by virtue of an order and decree made on May 26th, 1886, in 11 consolidated cause No. 198 of the equity docket of said court, entitled Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, *vs.* The Houston and Texas Central Railway Company *et al.*, which said order was modified and superseded by another order of date December 7, 1888, relieving said Easton and Rintoul from further duty as receivers in said cause and continuing Charles Dillingham as sole receiver; which said order was in the words and figures following, viz:

"This cause came on to be heard at this term on the application of Frederick P. Olcott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein and for other purposes, and was argued by counsel; whereupon and on consideration whereof it is ordered, adjudged, and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, by, and the same are hereby, relieved from any further duty as joint receivers in this cause, and that the said Easton and Rintoul do pass their accounts to date before John C. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as sole receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by the orders herein entered, appointing him and said Nelson S. Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in be-

half of or against the said joint receivers or in behalf of or 12 against the Houston and Texas Central Railway Company, and to prosecute or defend any rights, claims, or demands or actions at law or in equity which the said joint receiver might have

prosecuted or defended under the orders of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham, during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P. Olcott and George E. Downs, shall have power and authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and on payment to him of said notes to execute releases of the mortgages securing said notes on the land sold, and that he shall further have the power to make sales of and deeds for the lands in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him, and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the lands bought by the said George E. Downs, with the right in said Frederick P. Olcott and the said George E. Downs respectively to prevent any such sales by timely objection thereto, it being specially understood that no sales of lands bought by said Downs and covered by the mortgage to the Farmers' Loan and Trust Company as trustee of the first mortgage of the Waco and Northwestern division shall be made free of said mortgage except by and with the consent and deeds of said Farmers' Loan and Trust Company, trustee, as aforesaid."

That under and by said order said Easton and Rintoul were relieved, and said receivership extended and continued with Charles Dillingham as sole receiver thereof, with power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company, until the same be turned over to the purchasers thereof or he be relieved of his trust as such receiver.

13 That again, on, to wit, December 9, 1892, the following order was made by Hon. L. Q. C. Lamar, viz:

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,
vs.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, Appellees. }

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings as herein directed pending the hearing and decision of the said appeals—

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the re-

ceiver of the Houston and Texas Central Railway Company, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central Railway Company or any of the lines of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them to apply to me to vacate the said State if the said appellants fail to prosecute the said appeals with due diligence.

14 Dated Washington, December 9, 1892.

L. Q. C. LAMAR,

*Associate Justice of the Supreme Court of the United States,
Assigned to the 5th Circuit.*

That under and by virtue of said order said Dillingham was at the date of the institution of this suit and long prior thereto had been and still is in possession of all of said property as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court therefore has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of the said property, and that this suit was filed without leave of said honorable circuit court, and that this honorable court is therefore without jurisdiction in the premises.

Wherefore they pray judgment whether this court can or will take further cognizance of this suit.

T. D. COBBS,
Attorney for Defendants.

Should said plea to the jurisdiction of this court be overruled, these defendants, not waiving any objection thereto, but insisting upon the same, show the court that there is a defect of parties to this suit in this, that Charles Dillingham was appointed as the receiver of all the properties of the Houston and Texas Central Railway Company by the United States circuit court for the eastern district of Texas in consolidated cause No. 198, of Nelson S. Easton *et al. vs. Houston and Texas Central Railway Company et al.*, prior to the institution of this suit, and is now the receiver thereof, as shown in defendants' plea, as aforesaid, to the jurisdiction of this court, to which plea these defendants refer to as a part thereof, and the said Charles Dillingham, as receiver thereof, is invested 15 with full power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company until the same be turned over to the purchaser thereof or he be relieved of his trust as such receiver.

That the said property is still in his hands as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court thereof has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of said property, and as the receiver of said property (which property is in *custodia legis*) and as the officer of said court the said Charles Dil-

lingham, as receiver, has such interest in said property and the subject-matter of the litigation as to make him a necessary party hereto, and the said defendants here now plead the same and pray the judgment of the court.

T. D. COBBS,
Attorney for Defendants.

Sworn to and subscribed before me this 30th day of March, A. D. 1893.

JOHN C. COX,
Clerk Dist. Court, Nolan Co., Texas.

Should said plea be overruled or be held not to be well taken, then the defendants as aforesaid, reserving all exceptions to the ruling of the court on said pleas and not waiving same, now except to plaintiff's petition:

1. Because the same shows upon its face that the plaintiff is not entitled to recover in said suit in the manner and form as prayed, and of this defendants pray judgment of the court.
2. Defendants further specifically except to plaintiff's petition because the same does not specifically set out the wrongs, injuries, and trespasses, if any, with such particularity as would entitle or authorize the State of Texas to recover in this action, and defendants are not put upon any notice whatever of the particular claim or claims of the State of Texas, and of this the defendants pray the judgment of the court.
3. Because the same is wholly insufficient to have and to recover as therein prayed.
4. Because the said petition does not show affirmatively that the said attorney general, who instituted the suit, had authority to do so either under the law of this State or was properly directed to do so by the governor of the State of Texas. Defendants therefore pray the court that the said plaintiff be required to show whether or not he had authority to institute the suit and whether or not the same was instituted by the written request and direction of the executive.
5. Defendant specially excepts to that part of paragraph 10 of defendant's petition which sets out what purports be a special law, entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific ocean," because the said law, so far as it undertook to grant lands therein, was unconstitutional, null and void, and conferred no rights thereunder.

And of this prays the judgment of the court.

T. D. COBBS,
Attorney for Defendants.

Should said plea and exceptions be overruled, then defendants deny each and every allegation in plaintiff's petition contained, and of this put themselves upon the country.

II.

For further answer in this behalf defendants say that on
 17 or about the fourth day of May, 1888, a certain decree was
 rendered in the honorable circuit court of the United States
 for the eastern district of Texas, in a certain cause pending therein
 under the title of Nelson S. Easton and James Rintoul, trustees, and
 The Farmers' Loan and Trust Company, trustee, vs. The Houston
 and Texas Central Railway Company *et al.*, and bearing No. 198,
 consolidated cause, on the chancery docket of said court, at Galves-
 ton, wherein and whereby it was ordered, adjudged, and decreed
 that the said Houston and Texas Central Railway Company should,
 within thirty days from the date thereof, pay into said court certain
 sums of money which by said decree were adjudged to be due to
 the holders of certain bonds and coupons secured by certain deeds
 of trust or mortgages described in said decree, and whereby it was
 further ordered, adjudged, and decreed that in default of such pay-
 ments all of the mortgaged premises and property, real and personal,
 rights, privileges, immunities, and franchises, hereinafter more par-
 ticularly described, should be sold, without appraisement or redemp-
 tion, at public auction, in the manner and upon the terms specified
 in said decree, now on record in said honorable court in the cause
 aforesaid, and to which defendants crave leave to refer as a part of
 this answer in like manner as if the same were herein transcribed
 at length.

III.

That the said Houston and Texas Central Railway Company
 wholly fail- to pay the sums of money adjudged by said decree to
 be due within the time ordered or otherwise, and thereupon the
 said sale took place in accordance with the terms of said decree.

IV.

That at said sale, which took place in the city of Galves-
 18 ton on the 8th day of September, 1888, F. P. Olcott became
 the purchaser of the whole of the properties of every sort and
 description of the said Houston and Texas Central Railway Com-
 pany, wherever situated and of whatever sort or nature, with the
 exception, however, of the railroads, lands, and other property sub-
 ject to the first-mortgage lien on the Waco and Northwestern division,
 dated June 16th, 1875, and executed to the Farmers' Loan and
 Trust Company as trustee, and that the property so acquired by
 said Olcott included the railroad of the said company from Houston
 to Denison and from Hempstead to Austin, with road-beds, rights
 of way, buildings, and improvements of every kind and description
 connected with the said railroads or any part thereof, and all their
 appurtenances, material, supplies, and personal property of every
 kind procured for or — any manner connected with said railroad
 or used thereon or any part thereof; also all the chartered rights,
 liberties, privileges, immunities, and franchises of said railway com-
 pany of every kind and description whatsoever appertaining to said

railroad-; also all the lands which have been received from the State of Texas for the construction of railways of said railway company, not including the lands covered by the first mortgage on the said Waco and Northwestern division, and also all other lands, town lots or blocks, and real estate of every kind and description to which said railway company had title, claim, or equitable ownership, and also all the tools, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railways, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company appertaining to said railways, saving and reserving such portions of said lands as had been theretofore and prior to May 4, 1888, sold to other purchasers, but including all securities, unpaid consideration of said sales, the amount of such lands so purchased by
19 said F. P. Olcott being estimated to amount, exclusive of the lands pertaining to the railways themselves, to about four million three hundred and forty thousand three hundred and thirty-nine (4,340,339) acres, the property so conveyed to F. P. Olcott being more particularly described as follows: to wit:

1. All the property and premises, rights, privileges, immunities, and franchises of every kind and description covered by the main-line first mortgage and Western Division first mortgage of the said Houston and Texas Central Railway Company, including securities which were the proceeds of land sales and including all the main line and Western division of the railway of said railway company, the main line commencing at Houston and extending to the Red river, in the State of Texas, through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, Limestone, Freestone, Navarro, Ellis, Dallas, Collin, and Grayson, a distance of about three hundred and forty-five (345) miles, and the Western division commencing at Hempstead and extending to the city of Austin through the counties of Waller, Washington, Lee, Fayette, Bastrop, and Travis, a distance of about one hundred and eighteen and three-quarters ($118\frac{3}{4}$) miles, including in each case all the roadways and super-structures, side tracks, depots, stations, water tanks, section-houses, round-houses, machine shops, terminal facilities, buildings, and lands constituting a part of said main line and of said Western division respectively, and all improvements, rolling stocks, materials, and other personal property belonging to said main line or to said Western division respectively, and all the chartered rights, liberties, privileges, immunities, and franchises of said railway company relating to said main line or to the said Western division respectively, and also ten (10) sections of land for each mile of said main line and Western division, saving and excepting such portions of said lands as have been heretofore and prior
20 to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the prices of land sales, and such land so included in the purchase of the said F. P. Olcott being situated in the counties of Austin, Brown, Baylor, Borden, Clay, Concho, Caldwell, Chambers, Colorado, Crane, Comanche, Crockett, Dallam, Dickens, Fort Bend, Eastland, Fisher,

Foley, Grimes, Guadalupe, Hansford, Hardeman, Hardin, Harris, Hartley, Haskell, Henderson, Hill, Howard, Hutchinson, Hemphill, Jasper, Jones, Jefferson, Johnson, Jeff Davis, Kent, King, Knox, Liberty, Lipscomb, Mitchell, Moore, Navarro, Newton, Nolan, Ochiltree, Pecos, Polk, Potter, Presidio, Roberts, Robertson, Runnels, Reeves, Sabine, San Saba, San Jacinto, Scurry, Stonewall, Throckmorton, Taylor, Tom Green, Trinity, Waller, Walker, Wichita, Wilson, Ward, and Wilbarger, and being estimated to amount, exclusively of the lands pertaining to the railroad, to about two million five hundred and forty thousand three hundred and thirteen (2,540,313) acres.

2. All the land and property of every kind and description covered by the main-line and Western Division consolidated mortgage executed to the Farmers' Loan and Trust Company, dated October 1, 1872, which was not subject to either the main-line first mortgage or the Western Division first mortgage, said property including six (6) sections of land for each mile of said main-line and Western division, saving and excepting such portions of such lands as had been, prior to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sales, the amount of such lands so conveyed, which are situated in the counties of Archer, Bastrop, Brazoria, Baylor, Borden, Caldwell, Coleman, Concho, Crockett, Crane, Dallam, Eastland, El Paso, Fisher, Foley, Fort Bend, Garza, Glasscock, Hansford, Hardeman, Harris, Hartley, Haskell, Howard, Jasper, Jeff Davis, Kent, Knox, Liberty, Lipsecomb, Llano, Loving, McCulloch, Mitchell, Nolan, Ochiltree, Pecos, Presidio, Reeves, Runnels, Scurry, San Jacinto, Stonewall, Taylor, Tom Green, Upton, Walker, Waller, Ward, Wharton, Wichita, Wilson, and Wilbarger, being estimated at about one million six hundred and seven thousand five hundred and thirteen (1,607,513) acres.

21 3. All land — property of every kind and description covered by the Waco Northwestern consolidated mortgage, dated May 1st, 1875, executed to the Farmer' Loan and Trust Company, which were not subject to the Waco and Northwestern first mortgage, which said property includes about four thousand two hundred and forty (4,240) acres of land per mile of said Waco and Northwestern division, saving and excepting such portions of said land as have been theretofore and prior to May 4, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sales, the amount of such lands so conveyed, which are situated in the counties of Hansford, Howard, Glasscock, Kent, Mitchell, Tom Green, Ward, and Loving, being estimated at about one hundred and seventy-six thousand nine hundred (176,900) acres.

4. All the lands and property of every kind and description covered by the income and indemnity mortgage, dated May 7, 1877, and the general mortgage, dated April 1, 1881, or either of them which were not subject to either main-line first mortgage, or the Western Division first mortgage, or the Waco and Northwestern Division first mortgage, or the main-line and Western Division consolidated mortgage, or the Waco and Northwestern Division

consolidated first mortgage, saving and excepting such portions of said lands as had been, prior to May 4th, 1888, sold to other purchasers, and including all notes given to secure the credit portion of the price of land sale, the property so conveyed being situated in the counties of Bastrop, Brazos, Brown, Bee, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Grimes, Gonzales, Harris, Lee, McLennan, Johnson, Kaufman, Limestone, Milam, Navarro, Robertson, Travis, Washington, Waller, and Wharton, and estimated to include about fifteen thousand six hundred and thirteen (15,613) acres of land, and also a large number of town lots situated in the following towns: City of Houston, Harris county; town of Hempstead, Waller county; towns of Courtney and Navasota, Grimes county; towns of Millican, Wellbourn, Bryan, and Benhley, in Brazoria county; towns of Calvert, Hearne, and Bremond, in Robertson county; towns of Kosse, Thornton, Groesbeck, and Mexia, in Limestone county; town of Wortham, in Freestone county; towns of Corsicana and Richland, in Navarro county; town of Rice, in Navarro and Ellis counties; towns of Ennis, Palmer, and Ferris, in Ellis county; towns of Hutchins, Dallas, and Richardson, in Dallas county; towns of Plano, Allen, McKinney, Melissa, Anna, and Van Alstyne, in Collin; towns of Howe, Sherman, and Denison, in Grayson county; towns of Marlin and Reagan, in Falls county; towns of Waco and Ross, in McLennan county; town of Burton, in Washington; town of Ledbetter, in Fayette and Washington county; town of Giddings, in Lee county; towns of Paige and Elgin, in Bastrop county, and the town of Manor and city of Austin, in Travis county.

5. All the rights, title, and interest at law or in equity of the Houston and Texas Central Railway Company to all the lands and town lots on said 4th day of May, 1888, standing or originally standing of record in the name of A. Groesbeck and others, trustees, in the counties of Bastrop, Brazos, Brown, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Gonzales, Johnson, Kaufman, Limestone, Lee, McLennan, Navarro, Robertson, Washington, and Wharton, the said town lots situated as stated in the preceding paragraph marked "4th."

23 The property so conveyed, including all the lands, lots, and properties, being particularly described in certain schedules recorded in each of the counties above named, designating the land situated in each county covered and conveyed by each of the mortgages above described to the various trustees thereof (save and except those lands already sold prior to May 4th, 1888), and also particularly described in certain other schedules on file with the clerk of the circuit court of the United States at Galveston as part of the record in said consolidated cause No. 198, and which said schedules are referred to as a part hereof in like manner as if at length herein transcribed.

That under and in execution of said decree your defendant, Dillingham, as special master commissioner, duly appointed by said honorable circuit court, did make and deliver a deed to your defendant, Olcott, selling and conveying said lands and other prop-

erites aforesaid to him, said Oleott, and that said Houston and Texas Central Railway Company did, in obedience to the terms of said decree and as a further assurance to the purchaser, intervene and join in said deed by A. C. Hutchinson, its president; which said deed has been duly recorded in all counties in the State of Texas where the same is required to be recorded in manner and form required by law.

That said circuit court of the United States is and was a court of competent jurisdiction in the premises.

V.

That by virtue of the purchase of said property by said Oleott, one of the defendants herein, at the sale aforesaid and by reason of the facts herein alleged said Oleott became vested with a full, free, and unencumbered title in and to all the property purchased by

him at said sale and herein described, and that the land
24 claimed by plaintiff forms part of the land so purchased by

said Oleott and which before his said purchase belonged to said railway company and form part of the lands acquired by said railway company by grant from the State of Texas, as hereinafter fully set forth.

That he has not parted with any part of his said purchase save and except the railroad and the lands forming part of the right of way or being appurtenant to or used in connection with the operation of said railway, and that he is still the owner in fee-simple of the remainder of said property so conveyed to him, including the property herein claimed by plaintiff.

VI.

The Houston and Texas Central Railway Company was chartered by an act of the legislature of Texas approved March 11, 1848, entitled "An act to establish the Galveston and Red River Railroad Company."

By the terms of this act the company chartered was invested with authority of constructing a railway from Galveston bay or its contiguous waters to a point on Red river. (See special act of 1848, page 370.) By the terms of an act supplementary to the act to establish the Galveston and Red River Railway Company," approved February 7, 1853, defendant company was authorized to build its road to the city of Austin.

By special act of the legislature passed February 11, 1852, entitled "An act supplemental to an act to establish the Galveston and Red River Railroad Company" (see Special Laws of 1852, page 142), and especially by the 14th section of said act, there was granted said railroad company by the State eight sections of land of 640 acres each for every mile of railway actually completed by it and ready for use, and said section also prescribed the manner by which
land certificates should be issued, surveys made, and made
25 it the duty of the commissioner of the land office to issue patents to said company in its corporate name upon the re-

turn of the field-notes of any survey made by virtue of the certificate issued as contemplated by this section.

By subsequent act of the legislature, as before stated, passed September 1, 1856, the name of the organization known as the Galveston and Red River R. R. Co. was changed to that of the Houston and Texas Central Railway Company.

Subsequent to the act of the legislature of 1852 making a special grant to the Galveston and Red River R. R. Co. of eight sections of land of 640 acres each for each mile of completed road the legislature of Texas by general act passed a law entitled "An act to encourage the construction of railroads in Texas by donation of lands." Section 1 of this act provided that any railroad company chartered by the legislature of the State heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railroad should be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.

After providing the manner in which the road should be constructed, the manner in which the same should be inspected, the manner in which surveys should be made, it was prescribed by section 6 of said act that any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the governor, whose duty it shall be to appoint some skilful engineer (if there be no State engineer) to examine said section of the road, and if, upon the report of said engineer under oath, it should appear that said road had been constructed in accordance with the provisions of its charter and such general law of the State in force at the time regulating railroads, thereupon it shall be the duty of the commissioner
26 of the general land office to issue to said company patents for the odd sections of surveys in pursuance of the provisions of this act.

By the twelfth section of said act it was prescribed that the provision of the same should not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single-track road, with the necessary turnouts.

In 1855 the Houston and Texas Central Railway Company commenced the construction of its road from the city of Houston in a northerly direction to its present terminus on the Red river.

The legislature of Texas, by a number of acts, both general and special, extended to the Houston and Texas Central Railway Company all the rights and privileges granted to railroad companies generally of the land grants contemplated by the act of Jan. 30th, 1854.

By the act of the legislature approved Jan. 30th, 1854, it was prescribed that the provisions of the acts should not apply for any work not done within ten years after its passage; or, in other words, limited the operation of the law until Jan. 30th, 1864.

VII.

At the breaking out of the war between the Confederate States and the United States of America said railway company had constructed a line of its railway from its southern terminus in the city of Houston to the town of Millican, in Brazos county, a distance of about eighty miles; that during the war as aforesaid, and owing to the interruption occasioned thereby, the legislature of the State of Texas passed two several acts, one entitled "An act for the relief of companies incorporated for the purposes of internal improvement, by allowing them further time for performance on account of 27 the pending war," and the second entitled "An act for the relief of railroad companies."

The first-mentioned act provided that the time of the continuance of the then existing war between the Confederate States and the United States of America should not be computed against any internal improvement company in reckoning the period allowed them in their charter by any law, general or special, for the completion of any work contracted by them to do.

In the second act above referred to it was provided that the failure of any chartered railroad company in this State to complete any section or fraction of a section of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which said company would be entitled under provisions of an act entitled "An act to encourage the construction of railroads in Texas by donation of land," approved January 30, 1854, and the several acts supplemental thereto, provided said company should complete such section or fraction of a section as will entitle it to donations of land under existing laws within the two years after the close of the war between the Confederate States and the United States of America.

It was provided in the second section of said first-mentioned act and the fourth section of said last-mentioned act substantially as follows:

"That the lands to which any such company may now be entitled in pursuance of this act may be designated, surveyed, and patented at any time within two years after the passage of this act, and the president and directors of the Houston and Texas Central Railway Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original *bona fide* stockholders of said company, those who have paid 28 for stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others, and shall forward to the governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer, under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act: Provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company 10% upon their said stock on or before the expiration of the extension of

time provided in this act for railroad companies to fulfill that charter obligation to the State, then and in that case said stockholders shall forfeit all their rights, privileges, and property interests as stockholders in said road."

VIII.

That in pursuance of the provisions of said act the Houston and Texas Central Railway Company, acting by its board of directors, passed a resolution on the 25th day of November, 1862, by which the original *bona fide* stockholders of said company were restored to their rights upon the payment of the ten per cent. as provided in said resolution.

That the said resolution was in all respects prepared, passed, and adopted as *were* required to be done by the provisions of said aforesaid act, and the rights of such stockholders who paid ten per cent. of the par value of their stock were recognized and their stock treated as valid, and all who wished to do so voted at subsequent meetings.

That the books of the said Houston and Texas Central Railway Company show that the holders of 7,736 shares of said stock accepted the conditions and paid the ten per cent.

IX.

By the terms of an act passed on the 13th day of November, 1866, entitled "An act for the benefit of railway companies," the legislature authorized a grant of sixteen sections of land to the mile to railway companies heretofore or hereafter constructing railroads in Texas, under the same restrictions and limitations theretofore provided, for ten years after the passage of the act.

X.

That by virtue of and in pursuance with the laws hereinafter stated and the charter of said railway company and by virtue of an act of the legislature entitled "An act for the relief of the Houston and Texas Central Railway Company," passed on the 15th day of August, 1870, there *was* issued to the Houston and Texas Central Railway Company the land certificates which authorized it, the said company, to locate and survey all the lands hereinbefore described.

That the certificates were issued to said company by virtue of and in pursuance with said laws which granted lands to railway companies for sidings or turnouts as well as for main line of road; that the law of January 30, 1854, provided that "Any railroad company chartered by the legislature of this State heretofore or hereafter constructing within the limits of Texas a section twenty-five (25) miles or more of railroad shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order," and the 12th section thereof contained the following language: "The provisions of this act shall not extend to any company for more than a single-track road with the necessary turnouts."

XI.

That during the administration of Governor Pease, who
30 was governor when the law of 1854 was passed, and on down
through all the administrations of the several governors of
Texas, engineers were appointed by them to inspect the completed
roads from time to time, and made to the respective governors their
reports thereupon, showing the measurement and constructions,
equipment, &c., of said railroads, and showing, among other things,
particularly in their reports the number of miles of main line and side
tracks. The said reports were examined and approved by the gov-
ernor, and the Commissioners of the General Land Office issued certifi-
cates and in many cases patents for land for both sides and main tracks,
and in most cases not separating the quality for main line for the
quality for sidings up to and until the change of the law by the
act of August 16, 1876.

That under all the said laws prior to 1876 the executive officers
of the State interpreted the laws as entitling the Houston and Texas
Central Railway Company, as well as all other roads similarly
situated, to grants of land for the main line of its completed rail-
way, as well as for building and constructing its necessary side
tracks and turnouts.

XII.

That the Houston and Texas Central Railway Company com-
pleted and constructed its entire road by virtue of its charter and
the general and special laws passed by the legislature of the State
of Texas, and became entitled to said land grants and certificates
aforesaid; has spent large sums of money in the work of surveying
the lands and locating and equipping its said road, and paid to the
State of Texas large sums of money as taxes, which the State has
received annually on the lands.

That none of defendant's lands were located and surveyed later
than in 1874.

31

XIII.

That the lands granted to said railway company and herein de-
scribed and as acquired by said Olcott from said railway company
were located by virtue of certificates granted to it under the laws
aforesaid, some of which have been patented and others not pat-
ented; that the said lands have been surveyed in all respects as the
law requires land to be surveyed for railway companies by virtue
of grants of land—that is to say, into tracts of 640 acres each—and
an equal amount located, surveyed, and returned for the benefit of
the school fund; that the field-notes thereof were duly recorded,
and are now in the proper surveyor's district; that the maps and
plats and plants and sketches thereof were duly made, which, with
the field-notes and certificates, have been duly returned at the gen-
eral land office of the State of Texas within the time required by
law, and have remained on file in the general land office ever since;
that the same were duly platted upon the maps of the general land

office of the State of Texas, suitably marked as lands of the Houston and Texas Central Railway Company ; that the maps of same are in use in the land office of the State of Texas now, and the odd sections are recognized as Houston and Texas Central Railway Company's land, and maps thereof have been furnished to the county surveyors of the counties named, and are now in their possession and control, showing said lands platted thereon and recognized by the State of Texas through her officers as the land of the said Houston and Texas Central Railway Company.

XIV.

And, further answering, defendants say that by virtue of the charter and amendments of the defendant railway company and
32 by virtue of the laws of the State of Texas, general and special,
in force at the time, that defendant company was entitled to each and all of the certificates issued to it by the State of Texas and her officers for the construction and completion of that portion of the H. & T. C. R'y extending from Brenham, in Washington county, to Austin, in Travis county, Texas ; that in accordance with such laws in force as aforesaid and the charter of the said railway company the H. & T. C. R'y Co. made application to the governor, stating that it had completed and put in running order ninety-three miles or three sections of twenty-five miles each, and eighteen miles of road, requesting the governor of the State of Texas to instruct an engineer to examine the same and report, etc., and that the governor thereupon appointed an engineer to examine said road and report as required by law ; that the engineer examined the said road and under oath to the governor reported, among other things in his report, as follows : " It affords me pleasure to certify that for the 96 and $\frac{4}{5}\frac{7}{8}$ miles of road inspected the Houston and Texas Central Railway Company has complied with the provisions of its charter and of the general laws of the State of Texas relative to the construction of railroads."

Upon which report and action of said governor the said certificates were delivered and the said lands surveyed for the H. & T. C. R'y Co. and field-notes recorded and returned, together with sketches and maps thereof, to the general land office, where the same have remained ever since, and recognized and treated by the officials and the public as the lands of the H. & T. C. R'y Co. alone.

Defendants say further that such of said surveys sued for as are located in what is known as the " Pacific reservation " were located by virtue of a valid and lawful file made through Bexar county land district, bearing date July 28th, 1872, prior to the law creating
33 said reservation, and defendants' rights are in nowise affected by said reservation ; that said law, entitled " An act to adjust and define the rights of the Texas and Pacific Railway Company with the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific Ocean," so far as the same interferes with defendants' rights herein, or null and void.

XV.

Defendants aver that the decision of the governor of the State of Texas that the said Houston and Texas Central Railway Company had done and performed the conditions precedent to its right to said lands and all necessary antecedent acts before the issue to said company of certificates for said land was and is conclusive against the State, and that said governor is and was by the various legislative acts hereinbefore alleged constituted the sole and final judge whether or not said antecedent acts have been performed, and that the title vested in said railway company by the certificates of the commissioner of the general land office and surveys thereunder, pursuant to the findings and decisions of the governor of the State of Texas, vested a full and perfect title to said lands in said railway company, which title has been legally acquired by your defendant, Oleott, as aforesaid.

Defendants further aver that they are informed and believe that the supreme court of the State of Texas, the highest court known to the laws of said State, has by two decisions construed said act of January 30th, 1854, and the several acts amendatory thereof, especially the acts of January 11, 1862, and the act of November 13, 1866, and also the effect of said acts upon the charters of railroad companies incorporated by the legislature of 1866, wherein the said railway companies were granted lands under the act of January 30, 1854.

That the first of said decisions of the supreme court of Texas was made in 1872 in the case of *The Houston and Great Northern Railroad Company vs. Jacob Kuechler*, commissioner of the general land office, reported in the 36 vol. of Texas Reports, p. 383. In said case it was held that the act of January 30, 1854, was in force on November 5, 1868, and also on the 13th of November, 1866, when the grant made by the law of 1854 was extended for ten years; and it was further held that the charter of a railway company was a contract between the State of Texas and the incorporators, entitling the railway company to the benefit of the act of January 30, 1854, upon its compliance with the requirements of that act and of its charter, and that the 6th section of the 10th article of the constitution of the State of Texas of the year 1869, which prohibited the granting of land and the issuance of land certificates except to actual settlers, was prospective only and did not affect rights to land acquired by railroad companies under laws in effect previous to that date or at any other time. It was further held that, in view of the force to be given to the acts of 1862 hereinbefore referred to and by analogy to the provisions of the said constitution of 1869 suspending the statute of limitations, the time which elapsed between the 2nd of March, 1867 (when the first reconstruction laws of Congress were enacted), and the 30th of March, 1870 (when the State constitution of 1870 was accepted by Congress), is not to be computed against any individual or corporation to cut down any civil rights.

The other case wherein the supreme court of the State of Texas

construed said laws was in the case of The Galveston, Harrisburg and San Antonio Railway Company against The State of Texas, decided June 27th, 1891, and reported in the 81st volume of Texas Reports, p. 573. In said case the point was raised and submitted to the court for adjudication that the act of 1876, touching grants of land to railroad companies, was similar in its general effect to the act of January 30, 1854. In determining this point the court called particular attention to the difference between the language used in the two acts, but makes use of the following language:

"But it must be borne in mind that prior to 1876 the certificates were issued and grants of land made to the railway companies by virtue of the act of January 30, 1854. Pasch. Dig., art. 4945 *et seq.* The first section of that act reads as follows: 'Any railroad company chartered by the legislature of this State heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railway shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.' It must be conceded, we think, that this language, in so far as the question before us is concerned, is substantially the same as that contained in the granting clauses of the act under consideration, but the 12th section of the act of 1854 contained the following language: 'The provisions of this act shall not extend * * * to any company for more than a single-track road, with necessary turnouts.' This provision is not contained in the act of August 16, 1876. Its meaning is not clear to our minds. Whether it was intended to be merely descriptive of the railways which should be empowered to receive the grants or whether it was intended to grant lands for the sidings we are not called upon to decide. It must be conceded, however, that it admits of the latter construction and affords a reason for the interpretation placed upon the act by the executive officers of the State, which without it would not be apparent to our minds. The construction of this act, therefore, does not aid us in construing the latter statute. The omission from the latter act of the language quoted does not tend to support the construction claimed by appellant. The failure to insert it, if entitled to any weight, tends rather to the opposite conclusion. It may have been omitted with a view to deny the right to receive lands for the turnouts."

Now, defendants aver that by reason of the said decisions of the supreme court of the State of Texas, and also by reason of the decision of the Supreme Court of the United States in the case of *Davis v. Gray*, reported in 16 Wallace, p. 203, and by reason of the charters and laws of the State of Texas touching the grant of land to railroad companies; by reason of the construction placed upon the same by the executive officers of said State as aforesaid; by reason of the construction placed upon the laws by fifteen successive legislatures of the State of Texas, which have through a period of thirty years acted upon the construction of the law of 1854 given to said law by the governor of the State in 1856, when application was

first made for certificates for the length of both main line and necessary turnouts; by reason of the fact that the executive department, the one entrusted with the immediate administration of the land system of the State, has uniformly concurred in said construction, and that the same has been approved by successive governors of the State; by reason of the facts aforesaid said construction contemporaneous with the acts successively concurred in for more than thirty years by the executive, judicial, and legislative departments makes the construction placed upon said charters and laws a rule of property upon which your defendant, Oleott, has become vested with a title in fee-simple; that the construction so placed upon said laws and said rule of property has become a property right of your defendant, and that his deprivation of his property, through a new rule and through a new construction of said charter and laws, would be taken of his property without due process of law and would constitute an impairment of the contract entered into between said

State and said railroad company through the charter and
37 legislation aforesaid, all in violation of the 10th section of the first article of the Constitution of the United States, which provides "that no State shall pass any law impairing the obligation of contracts," and in violation of the 14th article of the amendments of said Constitution, which provides "that no State shall deprive any person of life, liberty, or property without due process of law" and that the said laws of the State of Texas hereinabove set forth, if construed in the manner contended for by said plaintiff, are violative of the said provisions of the said Constitution, and are therefore null and void.

XVI.

Defendants further aver that, by reason of the construction placed upon the said acts by all the departments of the State government as aforesaid and by reason of the said grants of land to the said Houston and Texas Central Railway Company, said railway company was given credit in the money markets of the world, and was enabled to raise and procure money for the purpose of constructing and extending its said railway by mortgages of said lands and of its other property duly authorized by said legislation of the State of Texas; that said lands formed a most important element in the credit originally obtained by said Houston and Texas Central Railway Company as the basis of floating its bonds; that said bonds were secured by deeds of trust, under foreclosure of which defendant Oleott acquired said lands.

That during more than twenty years the State of Texas and her officials have stood by and allowed the assertion of title by said Houston and Texas Central Railway Company in and to said lands, whereby credit was obtained as aforesaid, and that said State and said officials are therefore now estopped by their laches from setting

38 up any title in and to said lands, and that plaintiff's demand is a stale demand, and that your defendants especially plead laches, stale demand, and estoppel in bar of the claims so set up by said plaintiff.

XVII.

Defendants, further answering, say that if this honorable court should hold that any of the land claimed by plaintiff in this cause were granted to said railway company for sidings or turnouts, and that said lands should, therefore, or for any other reason wheresoever not have been located under the certificates under which the same were located, nevertheless that said railway company was at all times prior to said sale of September 8, 1888, entitled to said lands, for this, to wit:

That said railway company was upon said day and at all times prior thereto in possession of a large number of valid certificates, under which it never acquired any lands or under which lands were located, which locations have subsequently been ascertained to be null and void, and that said company was upon said 8th day of September, 1888, and at all times prior thereto entitled, upon a proper accounting with the State, to have located any of its certificates unlocated upon any lands acquired by it for sidings or otherwise under voidable locations or certificates.

That your defendant, Oleott, holds under such Houston and Texas Central Railway Company, and that the only remedy of the State, if any she has, is in a proper equity proceeding to come to an accounting with said railway company to ascertain whether or not said railway company has acquired a greater number of the acres of land in all from the State of Texas than it was entitled so to acquire under certificates issued to it, and against which no objection or defence whatsoever exists.

XVIII.

That said Houston and Texas Central Railway Company
39 and all its lands, franchises, and property of every nature and description whatsoever were at the time of the institution of said suits against it and long prior thereto and ever since have been and still are in the possession of the honorable the United States circuit court for the eastern district of Texas, through its receivers; that the same were placed in the hands of Charles Dillingham, Nelson S. Easton, and James Rintoul, as joint receivers, by virtue of an order and decree made on May 26, 1896, in consolidated cause No. 198 of the equity docket of said court, entitled Nelson S. Easton and James Rintoul, trustee, and The Farmers' Loan and Trust Company, trustee, vs. The Houston and Texas Central Railway Company *et al.*, now pending; which said order was modified and superseded by another order of date December 7, 1888, relieving said Easton and Rintoul from further duty as receivers in said cause and continuing said Charles Dillingham as sole receiver, which said order was in the words and figures following, to wit:

"This cause came on to be heard at this term on the application of Frederick P. Oleott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein and for other purposes, and was argued by counsel. Whereupon and on consider-

ation thereof it is ordered, adjudged, and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, be, and the same are hereby, relieved from any further duty as joint receivers in this cause, and that said Easton and Rintoul do pass their accounts to date before John C. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as *also* receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by
40 the orders herein entered appointing him and said Nelson S.

Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in behalf — or against the said joint receivers or in behalf of or against the Houston and Texas Central Railway Company, and to prosecute or defend any rights, claims, or demands or action at law or in equity which the said joint receivers might have prosecuted or defended under the order of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham, during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P. Olcott and George E. Downs, shall have power and authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and, on payment to him of said notes, to execute releases of the mortgages securing said notes on the land sold, and that he shall further have the power to make sale of and deeds for the land in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him, and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the lands bought by said George E. Downs, with the right in said Frederick P. Olcott and the said George E. Downs respectively to prevent any such sales by timely objection thereto, it being specially understood that no sale of land bought by said Downs and covered by the mortgage of the Farmers' Loan and Trust Company, as trustee of the first mort-
41 gage on the Waco and Northwestern division, shall be made free of said mortgage except by and with the consent and deed of said Farmers' Loan and Trust Company, trustee as aforesaid."

That under and by virtue of said order said Easton and Rintoul were relieved and said receivership extended and continued with your defendant, Charles Dillingham, as sole receiver thereof, with power to sue and defend all suits in respect to the property of the Houston and Texas Central Railway Company until the same be turned over to the purchaser thereof, or he be relieved of his trust as such receiver.

That said property is still in his hands as the receiver thereof, and that he has not been relieved of his said trust; that said honorable circuit court, therefore, has exclusive jurisdiction to decide upon conflicting claims to the ultimate possession and control of said property, and that this suit was filed without leave of said honorable circuit court, and that this honorable court is therefore without jurisdiction in the premises *ratione materiae*.

XIX.

Defendants further aver that any pretended claim, interest, or title urged and set up by said plaintiff in and to any of the lands aforesaid are utterly false and untrue; that the title of your defendant to said properties so acquired by him from said Houston and Texas Central Railway Company, under said decree of said United States circuit court, was and is a full, free, and unencumbered title in fee-simple.

XX.

That this cause is one arising under the Constitution and laws of the United States, and that the property claimed by plaintiff largely exceeds five thousand (\$5,000) dollars in value.

42

XXI.

Defendants further represent that the Houston and Texas Central Railway Company expended large sums of money in the work of surveying, locating, and equipping its said road, as aforesaid, and that it paid the taxes thereon up to the time when Charles Dillingham was appointed receiver thereof, in 1885, and the said Charles Dillingham after his appointment as such receiver for the said Houston and Texas Central Railway Company paid the taxes thereon from said time up to the present time, together upon all other lands of the Houston and Texas Central Railway Company granted by the State of Texas, which amount of taxes the State of Texas has never made provision to pay nor tendered or offered to return the same or any part thereof.

That it cost the railway company twenty-five dollars per section to survey the land sued for herein, which amounted to the aggregate sum of four hundred dollars, and it cost the further sum of — dollars per section to correct the surveys, amounting in the aggregate of the further sum of — dollars.

That the said Houston and Texas Central Railway Company and the said Charles Dillingham, receiver thereof, and the said F. P. Olcott have paid in taxes, for surveying the land and correcting the surveys, and in patent fees, for the entire issue of certificates, the sum of — dollars, and in addition have paid other large sums of money for the care, custody, and control of such land.

Said defendants say that the prayer of the State for the recovery of said land ought not to be heard and considered until the State of Texas return or offers to return the sums of money so paid out and expended, as aforesaid, and the defendants plead the same in bar of the further prosecution of this suit.

43

XXII.

If the court should believe that it had no power to extend the relief to the defendants herein prayed, and refuses to require the State to refund the money as paid out in taxes, betterments, &c., then these defendants pray the court to fix, establish, and impose some equitable terms upon the plaintiff in administering the relief sought, and make a full compliance with them a condition precedent to its enjoyment.

XXIII.

Further answering in this behalf, defendants sayeth that neither of them have been in possession of said property, but that the possession of said lands since the beginning of said receivership have continuously been in Charles Dillingham, the receiver thereof, under and by virtue of the orders and decrees of said United States circuit court, as aforesaid.

Wherefore, defendants, having fully answered so much of plaintiff's petition as they are advised it is necessary to do, ask to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained, and defendants further pray:

1. That it may please your honor to declare and decree *that* the location and survey so as aforesaid made by the Houston and Texas Central Railway Company *made* of the lands described in Nolan county, Texas, segregated from the mass of the public domain and caused to become the property of the Houston and Texas Central Railway Company, free from any and all claims on the part of the State of Texas, and that the said railway company thereby acquired a good and valid title thereto.

2. That it may please your honor to adjudge and decree that under
and by virtue of the said sale of September 8, 1888, said F. P.
44 Oleott acquired a fee-simple and unencumbered title to said
land herein sued for from said railway company, free from
any claim of said State of Texas.

3. Defendants further pray that if they have not asked for appropriate relief that they have such further orders and decrees as may be necessary and proper in the premises to secure to them their rights, for special and general relief, and for all their costs in this behalf expended.

T. D. COBBS,
Attorney for Defendant.

Endorsed as follows, to wit:

No. 269. State of Texas *vs.* F. P. Oleott *et al.* District court of Nolan county. Defendants' second amendment to original answer. Filed March 30th, 1893. John C. Cox, clerk district court, Nolan county, Texas.

Disclaimer of Geo. E. Downs.

Filed Apr. 11, 1890.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS }
 vs.
 H. & T. C. R'Y Co. et al. }

And now comes George E. Downs, one of the defendants herein, and says that at no time before or since the institution of this suit was this defendant in possession of the land or any part thereof sued for, and this defendant saith that he has no interest in or claim to said land sued for, and here now enters his disclaimer.

T. D. COBBS,
Attorney for Defendant.

Endorsed as follows, to wit:

Disclaimer of George E. Downs. Filed April 11th, 1890. John C. Cox, clerk district court, Nolan Co., Tex.

45

Conclusions of Fact and Law.

Filed April 19, 1893.

In District Court, Nolan County, March Term, A. D. 1893.

THE STATE OF TEXAS }
 vs.
 H. & T. C. R'Y CO., FRED. P. OLcott, & GEO. E. DOWNS. } No. 269.

This is a suit by the State, through its att'y general, J. S. Hogg, against the Houston & Texas Central Railway Company, Fred. P. Olcott, and George E. Downs to recover sixteen sections of land, each containing six hundred and forty acres, situated in Nolan county; suit filed February 3, 1890. George E. Downs files a disclaimer.

The court finds the following facts, viz:

- That a special act was passed by the legislature of the State of Texas, approved March 11, 1848, incorporating the Galveston & Red River Railway Company. By said act said company was authorized to construct a railroad from a point on Galveston bay or its contiguous waters to a point on Red river, with the privilege of constructing and maintaining branches. There was no land grant coupled with this act of incorporation.
- That a special act was passed by the legislature, approved February 14th, 1852, supplementary to the above act, in which it was provided that 8 sections of land of 640 acres each should be granted to said company for every mile of railroad actually completed and ready for use.
- That a special act was passed by the legislature, approved

January 23rd, 1856, supplementary to the several acts incorporating said company, in which it was provided that if said company completed its first 25 miles of road, commencing at the city of Houston, within six months after January 30th, 1856, its failure to complete any portion of its said road before said date should not operate as a forfeiture of any of its rights, and the said company would then be entitled to the rights, benefits, and privileges granted by an act approved January 30th, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land," and it was further provided in said special act "that nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854." By this special act also the said company was authorized to issue bonds and to mortgage all of its property.

46 4. That by virtue of a special act of the legislature approved September 1st, 1856, the name of the company was changed to the "Houston & Texas Central Railway Company."

5. That a special act was passed by the legislature and approved February 4th, 1858, providing that the failure of the Houston & Texas Company to complete the third section of 25 miles of its road by the 30th of July, 1858, should not work a discontinuance of the benefits conferred by any general laws of the State of Texas in reference to railroads, provided the third section should be completed by July 30th, 1859. This act contains a proviso "that the benefits of the provisions of any general law shall only accrue to the said railroad company whilst said law shall remain in force."

6. That on the 25th day of November, 1862, the said railway company, by its board of directors, passed a resolution by which the original *bona fide* stockholders of said company would be restored to their rights in said company upon the payment into the treasury of said company of 10 % upon their said stock in accordance with the provisions of the acts of the 11th day of January, 1862; that under and by virtue of said resolution said stockholders were accorded all rights contemplated by said law, and many stockholders took advantage thereof. A copy of said resolution was never forwarded to the governor of Texas.

7. That a special act was passed by the legislature and approved September 21st, 1866, which provided, among other things, 47 that the said Houston & Texas Central Railway Company shall construct and put in running order a section of 25 miles of additional road to that now built within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land (16 sections to the mile granted in the act) shall be discontinued when said company shall fail to construct and complete at least 25 miles of the road contemplated by their charter each year after the construction of said first-mentioned fifty miles of road, provided that said road shall be put in running order to Bryan station and cars running regularly thereon by the 1st day of September, 1867. This and the other special acts granting lands to said railway company provided the manner of procedure by which it could procure certificates for the land due to it.

8. That a special act of the legislature of date August, 1870, provides that "No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the 1st section of the act of the 21st of September, 1866, entitled 'An act granting lands to the Houston & Texas Central Railway Company,' but the said company shall have and enjoy all of the rights and privileges secured to it by existing laws the same as if the conditions embraced in the 1st section of said act of the 21st of September, 1866, had been in all respects complied with," with a proviso which was complied with.

9. That on the 1st day of January, 1865, the terminus of said railroad was at Millican, in Brazos county.

10. That the 4th section of 25 miles of said railroad, terminating at Bryan, was completed August 27th, 1867.

11. That the 5th section of 25 miles of said railroad was completed on or before June 15th, 1869.

48 12. That the 6th section was completed on or before August 17th, 1870.

13. That the 7th section was completed on or before July 15th, 1871.

14. That the 8th section was completed to Richland creek on the 26th of September, 1871.

15. That by an act of the legislature approved February 2, 1856, the Washington County Railroad Company was chartered for the purpose of constructing a railway from some point on the track of the Galveston & Red River R. R., crossing the Brazos river within the limits of Washington county, and then running in the most suitable direct line to Brenham, in said county. The said company was organized and constructed its road from Hempstead, in Waller county, to Brenham, in Washington county, a distance of about 25 miles.

16. That by the act of the legislature passed August 15th, 1870, the Washington County railroad was merged in and became a part of the Houston & Texas Central railway. This latter railway was authorized by said act to extend the Washington County railroad from Brenham to the city of Austin.

17. That the Houston & Texas Central railway received from the State of Texas 540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain; that each and all of these certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendant's line of railway extending from the city of Brenham to the city of Austin.

18. That the defendant's main line of track from Brenham to Austin mentioned in each of said certificates is $93\frac{1}{2}$ miles, and the sidings and switches at and between the same points is $2\frac{5}{8}$ miles.

19. That the land described in plaintiff's petition were located and are now held without patents by the defendants, by
49 virtue of said certificates, according to the number and description set forth in said petition.

20. The sections of defendant's line of railway from Brenham to Austin were completed, respectively, 1st, on January 20, 1871; 2nd, on September 15th, 1871; 3rd, on November 26th, 1871, and 4th, completed to Austin on 25th of December, 1871.

21. That the defendants paid taxes on the land sued for continuously since they were located up to the present time.

22. That the defendants paid all fees of locating and surveying the lands sued for, as well as for the same number of alternate sections for the public free-school fund.

23. That the various engineers appointed by the different governors to inspect railroads, as the same were constructed, in their respective reports of inspection stated the number of miles and feet of main track, the number of miles or feet of sidings. The action of the respective governors, except Governor Roberts, on said reports was usually in the following words: "Report examined and approved," upon which reports and action of the governors the commissioners of the general land office issued to the respective companies certificates for main track and sidings in form such as is shown by the record during the administration of Governor Roberts. He approved for only the number of miles of main track stated in the report. In one instance Governor Davis approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was done in one instance also by Governor Hubbard, for which certificates issued. Governor Hubbard on one of the reports endorsed: "This report of Inspector Gray examined and approved for 30 miles main track and sidings as being made, graded, and in all respects complying with the law."

24. That the lands sued for and described in plaintiff's petition are situated in Nolan county, Texas, in what is known as the Pacific reservation, created by special act of the legislature of date May 2, 1873, entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company within the State of Texas, etc.," and the same were located and surveyed, 14 of them on June 1st, 1873, and 2 of them June 7th, 1873.

25. That the 16 certificates by virtue of which the land sued for was located were issued by the commissioners of the general land office on July 1st, 1872, after the road from Brenham to Austin had been completed and put in running order, and after John W. Glenn, civil engineer and commissioner for the State, had reported to the governor of the State that the Houston & Texas Central Railway Company had complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

25. That since the location of said lands they have been platted upon the map in use at the general land office of the State of Texas and recognized by the land commissioners as the Houston & Texas Central Railway Company's lands.

That on the 26th day of May, 1886, in consolidated cause No. 198 of the equity docket of the circuit court of the United States for the eastern district of Texas, entitled "Nelson Easton & James Rintoul, trustees, and The Farmers' Loan & Trust Company, trustee, vs.

The Houston & Texas Central Railway Company *et al.*, Charles Dillingham, Nelson S. Easton, and James Rintoul were duly appointed receivers of all the lands, franchises, and property of every nature of said railway company.

That on December 7th, 1888, by an order of said circuit court said Easton and Rintoul were relieved from further duty as such receivers, and Charles Dillingham was continued as sole receiver until the property of said railway was turned over to the purchasers thereof.

51 That at a sale duly authorized by said circuit court, which took place in the city of Galveston on the 8th day of September, 1888, the defendant F. P. Olcott became the purchaser of the property of every kind and description of the Houston & Texas Central railway, including the lands in controversy.

That said receiver, Dillingham, duly executed to said F.P. Olcott a deed to said property, including the land in controversy.

That the Houston & Texas Central Railway Company, as a further assurance to the purchaser, intervened and joined in said deed by its duly authorized officer.

That said sale was duly confirmed by the court on the 8th day of January, 1889.

That the lands in controversy, as well as all other property of the railway, had been mortgaged by it, and the said sale was ordered for the purpose of paying off the mortgages.

Conclusions of Law.

1. That this suit having been brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, said railway company and Oleott, the same can be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal court, and that this suit is brought without the permission of the Federal court.

2. That the sale of the lands in controversy to F. P. Olcott and the deed executed to him were effectual to convey to him all title and interest in and to said lands then owned by said railway company.

3. That the resolution passed on November 25th, 1862, by the board of directors of the Houston & Texas Central Railway

52 Company, restoring its stockholders to their rights, etc., was a substantial compliance with the requirements of the act of June 11th, 1862, and a failure to file a copy of said resolution with the governor would not deprive said company of the benefits of said act.

4. That under and by virtue of the special act approved January 23rd, 1856, the State had the right to repeal the act of January 30th, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central railway.

5. That the special act approved February 4th, 1858, in so far as

the same could be held to grant land to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30th, 1854, granting lands to railroads expired by limitation.

7. That the effect of the act approved January 11th, 1862, extended the operation and life of the act of January 30th, 1854, until two years after the close of the war, which was May 28th, 1865. This last-named act therefore expired by limitation on the 28th of May, 1867, unless kept in force by the act approved November 13th, 1866.

8. That the act approved November 13th, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and is therefore null and void.

9. That the Houston & Texas Central railway cannot claim these lands under the special act of September 21st, 1866, granting 16 sections to the mile, for the reason that it failed to comply with the provisions of that act, that it should build fifty miles of road within two years from January 1st, 1867, and seventy-five miles within three years from that date. The company had therefore lost the right to earn land under that act.

10. That the act of August 15th, 1870, enacted after the adoption of the constitution of 1869, which repealed the act of September 30th, 1854, was in conflict with that constitution and therefore null and void.

11. That the defendant F. P. Olcott, having taken title under the certificates, no patents having been issued, is affected with notice of their invalidity under the constitution of 1869.

12. The foregoing conclusions render it unnecessary to determine whether the special law entitled "An act to adjust and define the rights of the Texas & Pacific Railway Company in the State of Texas in order to encourage the speedy construction of a railway through the State to the Pacific Ocean," approved May 2nd, 1873, is or is not constitutional.

13. Judgment will be rendered for the plaintiff for the land in controversy and for costs.

To which defendants except.

WM. KENNEDY,
Judge 32nd District.

Endorsed as follows, to wit:

Conclusions of fact and law. Filed April 19th, 1893. John C. Cox, clerk district court, Nolan county, Texas.

Judgment of the Court, April 19, 1893.

THE STATE OF TEXAS vs. HOUSTON & TEXAS CENTRAL RAILWAY Company, Fred. P. Olcott, & Geo. E. Downs.	} No. 269. April 19, 1893. } Judgment of Court.
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On this the 19th day of April, 1893, this cause came on to be heard, and the plaintiff, The State of Texas, appearing by her att'y general, C. A. Culberson, and the defendants appearing by att'y, when came on to be heard the plea of the defendants to the juris-

diction of this court, and the same, having been submitted
 54 and being duly considered, was overruled by the court; to
 which ruling the defendants except; and the plea of defendants
 that there was a want of necessary parties, and that Chas.
 Dillingham, as receiver of The H. & T. C. R'y Co., defendant, was a
 necessary party to this suit, and praying that the court abate this
 suit, and said plea being duly considered by the court, the same is
 in all things overruled; to which judgment the defendants except.
 Then came on to be heard the defendants' exceptions to plaintiff's
 original petition Nos. 1, 2, 3, & 4, and same being duly considered
 by the court, same are each in all things overruled; to which judgment
 the defendants except; whereupon came on to be heard the
 disclaimer filed by George E. Downs, one of the defendants in this
 suit, disclaiming title or right or possession to any of the lands
 sued for, and the court after considering same is of opinion that
 said George E. Downs should go hence without day and recover his
 cost in this behalf expended, and it is so ordered. Then this cause
 being called for trial on its merits, all parties, both plaintiff and
 defendants, having announced ready, when came said parties, by
 their attorneys, and submit the matters in controversy, as well of
 fact as of law, to the court, and the pleadings, evidence, and argument
 of counsel for all parties having been fully heard and understood
 by the court, it is the opinion of the court that the plaintiff,
 The State of Texas, should recover judgment. It is therefore ordered,
 adjudged, and decreed by the court that The State of Texas,
 plaintiff, do have and recover of the defendants The Houston &
 Texas Central Railway Company and Frederick P. Olcott the land,
 to wit, sixteen sections of land of 640 acres each, situated and lying
 in Nolan county, Texas, in that certain block of Houston & Texas
 Central Railway surveys known as block No. 64; all of which are
 more particularly described and designated by the following tabu-
 lated statement, showing block, survey, and certificate num-
 55 ber and number of acres and where located, to wit:

No. of certif.	Date of certif.	To whom issued.	Survey No.	Block No.	No. acres.	In what county located.
38/4438	7/1/1872	H. & T. C.	169	64	640	Nolan.
38/4443	"	"	191	"	"	"
40/4997	"	"	199	"	"	"
40/4998	"	"	201	"	"	"
40/4999	"	"	203	"	"	"
40/5001	"	"	207	"	"	"
40/5002	"	"	209	"	"	"
40/5003	"	"	211	"	"	"
40/5004	"	"	213	"	"	"
40/5005	"	"	215	"	"	"
40/5006	"	"	217	"	"	"
40/5019	"	"	243	"	"	"
40/5020	"	"	245	"	"	"
40/5021	"	"	247	"	"	"
40/5022	"	"	249	"	"	"
40/5023	"	"	251	"	"	"

It is further adjudged by the court that said plaintiff, The State of Texas, recover of said defendants the possession of said lands hereinbefore described, and that the said certificates upon and by virtue of which said lands were located by said defendant railway company, as hereinbefore described, are wholly void, and that same are hereby cancelled and held for naught, and that the cloud cast upon the title of plaintiff to aforesaid lands by the location and survey of said certificates is hereby removed, and that plaintiff recover of said defendants, jointly and severally, all costs in this behalf expended.

To which judgment the defendant- excepts.

Defendants' Motion for a New Trial.

Filed April 19, 1893.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS }
vs.
THE H. & T. C. R'Y Co. et al. }

And now comes the defendants and pray this honorable court to grant a new trial in said cause for the following reasons:

56

I.

Because this court is wholly without jurisdiction and without the power to try said cause, and because it was shown by the evidence in this case that prior to the institution of said suit all the property of the said Houston & Texas Central Railway Company was in the hands of a receiver appointed by the United States circuit court, and that the receiver was in possession of the property, and that the plaintiff brought this suit in violation of the comity existing between courts of concurrent jurisdiction for this, that the said plaintiff did not ask the permission of the said United States circuit court for the eastern district of Texas for permission to institute said suit and the same was brought in utter disregard of the pending receivership.

II.

Because the court erred in not abating said suit for the want of necessary parties in this, that the evidence showed upon the plea of defendants that Charles Dillingham, as receiver of all the properties of the Houston & Texas Central Railway Company, was in possession of the land sued for by virtue of such orders and decrees, and the law requires suit to be instituted in trespass to try title against parties in possession of the property, and that said Dillingham was therefore a necessary and proper party to said suit.

III.

Because the court's findings of facts are contrary to the evidence introduced on said trial.

IV.

Because the conclusions of law in said case are not the law of said cause and each and all of same are erroneous.

V.

Because the judgment of the court is contrary to the law and contrary to the evidence.

Wherefore defendants ask the judgment of the court to be set aside and a new trial granted in this behalf.

T. D. COBBS,
Atty for Defendants.

Endorsed as follows, to wit:

Defendants' motion for a new trial. Filed April 19th, 1893. J. C. Cox, cl'k dist. court, Nolan Co., Tex.

Order of Court Overruling Motion for New Trial.

STATE OF TEXAS vs. H. & T. C. R'Y Co., FRED. P. OLcott, et al.	}	No. 269.
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APRIL 19TH, 1893.

On this the 19th day of April, 1893, came on to be heard defendants' motion to set aside the decree of the court rendered in this cause on this date and to grant to defendants a new trial, both parties appearing by attorneys, and the court, having heard and considered said motion, as well as argument of counsel, is of the opinion that the law is against said motion. It is therefore ordered, adjudged, and decreed by the court that said motion be, and the same is hereby, in all things overruled; to which ruling of the court the defendants except and give notice of appeal in open court to the court of civil appeals, 2nd supreme judicial district of Texas; and the parties in this cause are given ten days after the adjournment of this court in which to file their statement of facts.

Defendants' Bill of Exceptions No. 1.

Filed March 13, 1893.

STATE OF TEXAS vs. F. P. OLcott et al.	}	No. 269. Pending in the District Court of Nolan County, Texas.
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Be it remembered that on the trial of the above-stated cause the defendants read in evidence the deposition of C. C. Gibbs, and the plaintiff objected to the answers of C. C. Gibbs when offered to those numbered four, five, and six; which answers are in words and figures as follows:

IV. To the fourth interrogatory the witness answers: As near as I can now determine, of the certificates issued on that portion of the

THE STATE OF TEXAS.

road from Brenham to Austin the company has lost 29,353 acres of land by reason of conflict with older locations and surveys, adjustments of surveys, and invalid locations. There may be other surveys lost for the same reason which have not yet come to my knowledge. The attached exhibit, which I have marked A for identification, shows the number of acres considered valid in this issue and the number of acres in each survey in conflict and considered void for this as well as other causes, especially indicated in the exhibit. In the column of remarks is a brief statement of the causes producing the losses in these surveys, which is approximately correct.

V. To the fifth interrogatory the witness answers: In my answer to the fourth interrogatory I have answered this, and beg to refer again to the statement hereto attached and marked "Exhibit A." None of the certificates of this issue were lost or forfeited for non-return to the general land office, but subsequent to their location conflict with older surveys and deficiencies in blocks were discovered, necessitating corrections to relieve the conflicts, thus reducing

the acreage or compelling an abandonment of the entire survey.

59 VI. To the sixth interrogatory the witness answers: I have attached to these answers a tabulated statement and marked it "Exhibit A" for identification, in answer to this interrogatory.

The said exhibits referred to are as follows:

"EXHIBIT A."

Cert.	Sur.	Blk.	County.	Valid acres.	Void acres.	Remarks.
35/3497	1	41	Hemphill...	640		
3498	3	"	" ...	636	4	
3499	5	"	" ...	632	8	
3500	7	"	" ...	630	10	
3501	9	"	" ...	628	12	
3502	11	"	" ...	624	16	
3503	13	"	" ...	620	20	
3504	15	"	" ...	618 $\frac{1}{2}$	21 $\frac{1}{2}$	
3505	17	"	" ...	617	23	
3506	19	41	" ...			
to	to	"	" ...	52,480		
3587	181	"	" ...			
3588	1	42	" ...			
to	to	"	" ...	44,160		
3656	137	"	" ...			
3657	139	42	Roberts...			
to	to	"	" ...	26,880		Exhibit A. Signed for identification.
3698	221	"	" ...			
3699	1	43	Hemphill...			
to	to	"	" ...	9,600		G. H. Pendarvis, N. P., H. Co., Texas.
3713	29	"	" ...			
3714	31	"	Roberts...			
to	to	"	" ...	4,480		
3720	43	"	" ...			
3721	45	"	Ochiltree...			
to	to	"	" ...	4,480		
3727	57	"	" ...			

"EXHIBIT A"—Continued.

Cert.	Sur.	Bk.	County.	Valid acres.	Void acres.	Remarks.
3728	59	43	Lipscomb ..	19,200		
to	to	"	" ..			
3757	117	"	Ochiltree...	8,960		
3758	119	"	Ochiltree...			
to	to	"	" ..			
3771	145	"	" ..			
3772	147	"	Lipscomb ..	19,200		
to	to	"	" ..			
3801	205	"	Ochiltree...	8,960		
3802	207	"	Ochiltree...			
to	to	"	" ..			
3815	233	"	" ..			
3816	235	"	Lipscomb ...	640		
3817	237	"	" ..			
to	to	"	" ..	18,560		
3845	293	"	" ..			
3846	295	"	Ochiltree...	8,960		
to	to	"	" ..			
3859	321	"	" ..			
3860	323	"	Lipscomb ..	19,200		
to	to	"	" ..			
3889	381	.....			
60						
3890	383	43	Ochiltree...	8,960		
to	to	"	" ..			
3903	409	"	Lipscomb ..	19,200		
3904	411	"	" ..			
to	to	"	" ..			
3933	469	"	Ochiltree...	8,960		
3934	471	"	" ..			
to	to	"	" ..			
3947	497	"	" ..			
3948	499	"	Lipscomb ..	5,760		
to	to	"	" ..			
3956	515	"	Runnels ..	3,840		
3957	87	64	Runnels ..			
to	to	"	" ..			
3961	97	"	" ..			
3962	81	"	Taylor,	516	124	Conflict with h'r's Lila Forsythe.
3963	101	"	Runnels....	640		
3964	103	"	Taylor,	2,560		
to	to	"	" ..			
3967	109	"	" ..			
3968	115	"	" ..	640		
3969	113	"	" ..	640		
3970	117	"	" ..	640		
3971	119	"	" ..	640		
3972	{ 121	"	" ..	320	192	Conflict with sur- veys Nos. 119, 120, & 121, bl'k 64.
	{ 127	"	" ..	128		
3973	123	"	" ..	640		
3974	125	"	" ..	640		
3975	129	"	" ..	11,520		
to	to	"	" ..			
3992	163	"	" ..	640		
3993	167	"	" ..	640		
3994	169	"	" ..	640		
3995	{ 189	"	Nolan.....	179	141	Lost by conflict with Pedro Martinez survey.
	{ 171	"	Taylor,....	320		

THE STATE OF TEXAS.

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"EXHIBIT A"—Continued.

Cert.	Sur.	Blk.	County.	Valid acres.	Void acres.	Remarks.
3996	175	64	Taylor.....	640		
3997	23	2	Tom Green..	640		
3998	21	"	"			
to	to	"	"			
4008	1	"	"			
4009	25	"	"			
to	to	"	"			
4032	71	"	"			
4033	79	"	"			
to	to	"	"			
4036	73	"	"			
61						
4037	81	2	Tom Green }			
to	to	"	"	11,520		
4054	115	"	"			
4055	213	1	Nolan.....	640		
4056	215	"	"	640		
4057	121	2	Tom Green..	640		
4058	123	"	"	640		
4059	125	"	"	640		
4060	149	1	Nolan.....	640		
4061	431	"	Tom Green..	640		
4062	451	"	"	640		
4063	449	"	"	640		
4064	153	2	"	640		
4065	151	"	"	640		
4066	149	"	"	640		
4067	147	"	"	640		
4068	145	"	"	640		
4069	143	"	"			
to	to	"	"	5,760		
4077	127	"	"			
4078	181	"	"			
to	to	"	"	8,960		
4091	155	"	"			
4092	183	"	"			
to	to	"	"	7,680		
4103	205	"	"			
4104	211	"	"	640		
4105	209	"	"	640		
4106	207	"	"	640		
4107	213	"	"			
to	to	"	"	23,680		
4143	285	"	"			
4144	313	"	"			
to	to	"	"	8,960		
4157	287	"	"			
4158	117	"	"	640		
4159	31	1	Nolan.....	7,680		
to	to	"	"			
4170	9	"	"			
4171	5	"	"	640		
4172	1	"	Mitchell....	637½	2½	By corrected notes in
4173	3	"	"	640		resurvey of blk 1.
62						
4174	7	1	Nolan.....	640		
4175	49	"	"			
to	to	"	"	5,760		
4183	33	"	"			

"Exhibit A"—Continued.

Cert.	Sur.	Blk.	County.	Valid acres.	Void acres.	Remarks.
4184	67	1	Nolan }	5,760		
to	to	"	" }			
4192	51	"	" }			
4193	87	"	" }	6,400		
to	to	"	" }			
4202	69	"	" }			
4203	107	"	" }			
to	to	"	" }	6,400		
4212	89	"	" }			
4213	125	"	" }			
to	to	"	" }	5,760		
4221	109	"	" }			
4222	145	"	" }			
to	to	"	" }	6,400		
4231	127	"	" }			
4232	147	"	" }	640		
4233	151	"	" }			
to	to	"	" }	8,960		
4246	177	"	" }			
4247	1	31	Tom Green }			
to	to	"	" }	3,200		
4251	9	"	" }			
4252	11	"	Crockett }	640		
4253	13	"	" }	622	18	Lost by correction and adjustment of blk 31.
4254	15	"	" }	640		
4255	17	"	" }	640		
4256	19	"	" }			
to	to	"	" }	3,200		
4260	27	"	" }			
4261	29	"	" }	584	56	Lost in correction of surveys of blk 31.
4262	31	"	" }	588	52	
4263	33	"	" }			
to	to	"	" }	5,120		
4270	47	"	" }			
4271	1	32	" }			
to	to	"	" }	6,400		
4280	19	"	" }			
4281	11	2	Tom Green }			
to	to	"	" }	7,040		
4291	31	"	" }			
<hr/>						
63						
4292	1	3	Tom Green }			
to	to	"	" }	8,320		
4304	25	"	" }			
4305	3	4	" }			
to	to	"	" }	2,560		
4308	9	"	" }			
4309	179	1	Nolan	640		
4310	181	"	"	640		
4311	183	"	"	640		
4312	203	"	"	640		
4313	11	4	Tom Green	640		
4314	13	"	"	640		
4315	15	"	"	640		
4316	291	1	"	640		
4317	287	"	"	640		
4318	307	"	Nolan			
to	to	"	"	3,200		
4322	315	"	"			

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"EXHIBIT A"—Continued.

Cert.	Sur.	Bk.	County.	Valid acres.	Void acres.	Remarks.
4323	325	1	Nolan . . . }	2,560		
to	to		" . . . }			
4326	315	"				
4327	289	"	Tom Green . . . }	377	263	Lost in correction by conflict with older sur.
4328	"			640		
4329	279	"	" . . . }	640		
4330	281	"	" . . . }	640		
4331	285	"	" . . . }	640		
4332	335	"	Nolan . . . }	3,200		
to	to		" . . . }			
4336	327	"				
4337	345	"	Tom Green . . . }	3,200		
to	to		" . . . }			
4341	337	"	" . . . }			
4342	427	"	" . . . }			
4343	347	"	" . . . }			
to	to		" . . . }			
4349	359	"	" . . . }			
4350	375	"	" . . . }			
to	to		" . . . }			
4357	361	"	" . . . }			
4358	391	"	" . . . }			
to	to		" . . . }			
4364	379	"	" . . . }			
4365	377	"	" . . . }	635	5	Lost in correction by reason of conflict with older sur.
4366	409	"	" . . . }	600	40	
64						
4367	407	1	Tom Green . . . }	5,120		
to	to		" . . . }			
4374	393	"	" . . . }			
4375	425	"	" . . . }			
to	to		" . . . }			
4382	411	"	" . . . }			
4383	439	"	" . . . }			
to	to		" . . . }			
4386	433	"	" . . . }			
4387	1		San Saba . . . }	2,560		
to	to		" . . . }			
4400	27		" . . . }	8,960		
4401	29		" . . . }			
	29½		" . . . }	320		
4402	31		" . . . }	320		
4403	33		" . . . }	640		
	33½		" . . . }	320		
4404	35		" . . . }	320		
to	to		" . . . }			
4412	51		" . . . }			
4413	53		" . . . }	320		
	53½		" . . . }	320		
4414	55		" . . . }	640		
4415	57		" . . . }	320		
	57½		" . . . }	320		
4416	59		" . . . }			
to	to		" . . . }	4,480		
4422	71		" . . . }			
4423	73		" . . . }	320		
	73½		" . . . }	320		

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4424	75	.....	San Saba...}	6,400		
to	to		"			
4433	93	.....	" .....	320		
4434	{ 95	.....	" .....	320		
	{ 95½	.....	" .....	320		
4435	{ 97	.....	" .....	320		
	{ 97½	.....	" .....	320		
4436	{ 99	.....	" .....	320		
	{ 99½	.....	" .....	320		
4437	177	64	Taylor.....	438	202	Lost in correction by conflict with older sur.
4438	179	"	"	608	32	
4439	181	"	Nolan.....	627	13	
4440	183	"	"	640		
4441	185	"	"	640		
4442	187	"	"	640		
4443	191	"	"	640		
65						
4444	193	64	Nolan.....	640		
4445	195	"	"	640		
4446	197	"	"	640		
4447	1	2	Pecos.....	12,160		
to	to		"			
4465	37	"	"			
4466	1	3	"			
to	to		"			
4485	39	"	"	12,800		
4486	17	4	Tom Green }			
to	to		"	3,840		
4491	27	"	"			
4492	29	"	"	453	187	Lost by correction and adjustment of bl'k.
4493	31	"	"	640		
4494	33	"	"	640		
4495	1	"	"	640		
4496	35	"	"	640		
4497	37	"	"	640		
4498	39	"	"	640		
4499	57	5	"	8,960		
to	to		"			
4512	83	"	"			
4513	85	"	"	540	100	Lost by correction of deficiency in bl'k.
4514	1	"	"			
to	to		"	5,120		
4521	15	"	"			
4522	1	33	Ward (formerly Tom Green). "	16,000		
to	to		"			
4546	49					
4547	1	1	Presidio (now J. Davis).	640		
4548	3	1	"	640		
4549	5	"	"	528	112	Conflict with older surveys and corrected.
4550	7	"	"	603	37	
4551	1	2	"	640		
4552	11	1	Pecos.....	640		
4553	13	"	"			
to	to		"	4,480		
4559	25	"	"			

"EXHIBIT A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4560	3	1	Presidio (now Jeff. Davis). } " }	8,960		
to	to					
4573	29	"				
66						
4574	55	1	Pecos..... }	3,840		
to	to		"			
4579	65	"				
4580	31	2	Presidio, now Jeff. Davis.	640		
4581	33	"	" ..	640		
4582	35	"	" ..	640		
4583	1	3	" ..			
to	to			6,400		
4592	19	"	" ..			
4593	93	1	Pecos.....	544	96	Conflict with H. & G. N. Ry Co. surveys.
4594	95	"	"			
to	to			4,480		
4600	107	"	"			
4601	21	3	Presidio, now Jeff. Davis.	5,760		
to	to					
4609	37	"	" ..			
4610	1	4	" ..	640		
4611	3	"	" ..	640		
4612	131	1	Pecos.....	311	329	Conflict with H. & G. N. Ry Co. surveys.
4613	133	"	"			
to	to			5,120		
4620	147	"	"			
4621	149	"	"	516	124	Conflict with H. & G. N. Ry Co. surveys.
4622	5	4	Presidio, now J. Davis.	640		
4623	7	"	" ..	640		
4624	9	"	" ..	640		
4625	11	"	" ..	640		
4626	159	1	Pecos.....	640		
4627	13	4	Presidio, now J. Davis.	3,840		
to	to					
4632	23	"	" ..			
4633	173	1	Pecos.	5,120		
to	to					
4640	187	"	"			
4641	189	"	"	378	262	Conflict with H. & G. N. Ry Co. sur.
4642	25	4	Presidio, now J. Davis.	3,200		
to	to					
4646	33	"	" ..			
67						
4647	1	28	Mitchell.... }			
to	to		" .. }			
4671	49	"				Lost in T. & P. re- serve.
4672	249	1	Nolan.....	640		
4673	251	1	"	640		
4674	271	"	"			
to	to			6,400		
4683	253	"	"			
4684	305	"	"	640		

"Exhibit A"—Continued.

Cert.	Sur.	Bl'k.	County.	Valid acres.	Void acres.	Remarks.
4685	303	1	Tom Green..	640		
4686	25	5	" ..	640		
4687	301	1	" ..	640		
4688	299	"	" ..	640		
4689	295	"	" ..	640		
4690	293	"	" ..	640		
4691	277	"	" ..	640		
4692	275	"	" ..	640		
4693	273	"	" ..	640		
4694	429	"	" ..	640		
4695	297	"	" ..	569	71	Lost in correction by adjustment of bl'k.
4696	283	"	" ..	640		
4697	447	"	" ..	640		
4698	445	1	" ..	640		
4699	443	"	" ..	640		
4700	441	"	" ..	640		
4701	457	"	" ..	640		
4702	455	"	" ..	640		
4703	453	"	" ..	640		
4704	469	"	Nolan.....	387	253	Lost in correction by conflict with older surveys and adjustment.
4705	467	"	" ..			
to	to				3,200	
4709	459	"	" ..			
4710	477	"	Tom Green			
to	to				2,560	
4713	471	"	" ..			
68						
4714	483	1	Tom Green..	541	99	Lost by correction by conflict with older survey and adjustment.
4715	481	"	" ..	640		
4716	479	"	" ..	640		
4717	199	"	Nolan	640		
4718	119	2	Tom Green..	640		
4719	201	1	Nolan	640		
4720	197	"	" ..			
to	to				4,480	
4726	185	"	" ..			
4727	205	"	" ..			
to	to				2,560	
4730	211	"	" ..			
4731	217	"	" ..			
to	to				3,840	
4736	227	"	" ..			
4737	231	"	" ..	640		
4738	229	"	" ..	640		
4739	233	"	" ..			
to	to				5,120	
4746	247	"	" ..			
4747	1	1	Tom Green			
to	to				12,800	
4766	39	"	" ..			
4767	1	2	" ..			
to	to				5,120	
4774	15	"	" ..			
4775	19	"	" ..	640		
4776	23	"	" ..	640		
4777	27	"	" ..			
to	to				3,200	
4781	35	"	" ..			

"EXHIBIT A"—Continued.

Cert.	Sur.	Bf&k.	County.	Valid acres.	Void acres.	Remarks.
4782	37	2	Tom Green..	232	408	
4783	39	"	" ..	640		Lost in correction by deficiency in block.
4784	1	3	" ..			
to	to	"	" ..			
4795	23	"	" ..			
4796	1	4	" ..			
to	to	"	" ..			
4815	39	"	" ..			
69						
4816	1	5	Tom Green }			
to	to	"	" ..			
4828	25	"	" ..	8,320		
4829	1	6	" ..	640		
4830	5	"	" ..	530	110	
4831	7	"	" ..	591	49	
4832	9	"	" ..			Lost in correction by deficiency in block.
to	to	"	" ..			
4840	25	"	" ..			
4841	51	33	" ..			
to	to	"	" ..			
4860	89	"	" ..			
4861	91	"	" ..	632	8	T. & P. reserve.
4862	93	"	" ..	613	27	" ..
4863	95	"	" ..	640		
4864	97	"	" ..	640		
4865	99	"	" ..	340	300	" ..
4866	101	"	" ..	74	566	" ..
4867	103	"	" ..			
to	to	"	" ..			
4880	129	"	" ..			
4881	7	34	" ..			
to	to	"	" ..			
4884	1	"	" ..			
4885	11	"	" ..			
4886	9	"	" ..			
4887	17	"	" ..			
4888	15	"	" ..			
4889	13	"	" ..			
4890	25	"	" ..			
to	to	"	" ..			
4893	19	"	" ..			
4894	31	"	" ..			
4895	29	"	" ..			
70						
4896	27	34	Tom Green..	640		
4897	39	"	" ..			
to	to	"	" ..			
4900	33	"	" ..			
4901	45	"	" ..			
4902	43	"	" ..			
4903	41	"	" ..			
4904	51	"	" ..			
4905	49	"	" ..			
4906	47	"	" ..			
4907	59	"	" ..			
to	to	"	" ..			
4910	53	"	" ..			
4911	67	"	" ..			

"EXHIBIT A"—Continued.

Cert.	Sur.	Blk.	County.	Valid acres.	Void acres.	Remarks.
4912	65	34	Tom Green ..	640		
4913	63	"	" ..	640		
4914	61	"	" ..	640		
4915	69	"	" ..			
to	to				33,920	
4967	173	"	" ..			
4968	181	"	" ..	640		
4969	179	"	" ..	640		
4970	177	"	" ..	640		
4971	175	"	" ..	640		
4972	191	"	" ..			
to	to				3,200	
4976	183	"	" ..			
4977	201	"	" ..			
to	to				3,200	
4981	193	"	" ..			
4982	211	"	" ..			
to	to				3,200	
4986	203	"	" ..			
4987	213	"	" ..			
to	to				6,400	
4996	231	"	" ..			
71						
4997	199	64	Nolan			
to	to		" ..		7,040	
5007	219	"	" ..			
5008	221	64	Taylor.....			
to	to		" ..		3,200	
5012	229	"	"			
5013	231	"	"		320	
5013	315	"	"		320	
5014	233	"	"			
to	to		" ..		3,840	
5019	243	"	" ..			
5020	245	"	Nolan			
to	to		" ..		3,840	
5025	255	"	" ..			
5026	257	"	" ..			
to	to		" ..		7,040	
5036	277	"	" ..			
Sheet No. 1						
			1	175,885 $\frac{1}{2}$	114 $\frac{1}{2}$	
			2	122,756	124	
			3	59,827	333	
			4	72,320		
			5	54,379 $\frac{1}{2}$	20 $\frac{1}{2}$	
			6	42,772	108	
			7	40,652	308	
			8	38,153	247	
			9	67,404	436	
			10	46,171	549	
			11	29,747	16,333	
			12	31,008	352	
			13	74,278	602	
			14	20,894	9,826	
			15	69,120		
			16	16,880		
Grand total ..						
				956,247	29,353	

72 The court thereupon sustained said objection and defendants were not permitted to read said answers nor said exhibit; to which ruling of the court in excluding the same the defendants then and there excepted, and now here tender their said bill of exceptions in open court, and pray the same to be signed, approved, and made a record in said cause.

T. D. COBBS,
Atty for Defendants.

Approved:

WM. KENNEDY,
Judge 32nd Dist.

Endorsed as follows, to wit:

Defendants' bill of exceptions No. 1. Filed March 31st, 1893.
John C. Cox, clerk dist. court, Nolan Co., Texas.

Defendants' Bill of Exceptions No. 2.

Filed March 31, 1893.

STATE OF TEXAS } vs. No. 269. Pending in the District Court of
F. P. OLcott et al. } Nolan County, Texas.

Be it remembered that on the trial of the above-stated cause the defendants offered in evidence the deposition of Geo. W. Polk, and the plaintiff objected to the answers of the said Geo. W. Polk when offered to those numbered four and five; which answers are in words and figures as follows:

IV. To the fourth interrogatory he answers: "Of the certificates issued to it on that part of its road from Brenham to Austin the company lost by conflicts twenty-nine thousand two hundred and thirty-one acres, approximately."

V. To the fifth interrogatory he answers: "Of the certificates as located nine hundred and fifty-six thousand four hundred and thirty-one are invalid. The lands lost were on account of conflicts with prior locations."

73 The court thereupon sustained said objection and defendants were not permitted to read said answers; to which ruling of the court in excluding the same the defendants then and there excepted, and now tender their said bill of exceptions in open court and pray the same to be signed, approved, and made a record in said cause.

T. D. COBBS,
Atty for Defendants.

Approved:

WM. KENNEDY,
Judge 32nd District.

Endorsed as follows, to wit:

Defendants' bill of exceptions No. 2. Filed March 31st, 1893.
John C. Cox, clerk dist. court, Nolan Co., Texas.

Statement of Facts.

Filed May 1, 1893.

STATE OF TEXAS }
vs. } Tried in the District Court of Nolan County.
F. P. OLcott et al. }

Be it remembered that on the trial of the above-stated cause the following proceedings were had, and which embraces all the material facts introduced upon the trial of said cause:

The State introduced in evidence the following agreement between the parties, which is as follows, to wit:

Agreed Statement.

An agreed statement of facts to be used in the trial of the following cause.

In the District Court of Nolan County, Texas.

THE STATE OF TEXAS }
vs. }
THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, FREDERICK }
P. OLcott, and GEORGE E. DOWNS. }

We agree that the facts in this case are as follows:

- 74 1. That the defendants received from the State of Texas 1,540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain, and each of said certificates being in form and substance as "Exhibit A" hereto attached.
2. That each and all of the said 1,540 land-scrip certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendants' line of railway extending from the city of Brenham, in Washington county, to the city of Austin, in Travis county, as more fully appears from "Exhibit B" hereto attached.
3. That defendants' main line of track from the city of Brenham, in Washington county, to the city of Austin, in Travis county, mentioned in each of said certificates, is $93\frac{1}{2}$ miles and the sidings and switches at and between the same points is $2\frac{3}{4}$ miles.
4. That the land described in plaintiff's petition were located and are now held without patent by the defendants by virtue of said certificates, according to the number and description set forth in said petition.
5. That the construction of that portion of defendants' line of railway from the city of Brenham, in Washington county, to the city of Austin, in Travis county, was begun and completed at the time stated in the affidavit of Capt. Howe hereto attached, marked "Exhibit C."

6. That all special acts of the legislature of the State of Texas, all railroad charters and amendments thereto, bearing upon the subject-matter of this litigation may be considered in evidence and read to the court without introducing the same.

7. Any other pertinent fact may be introduced in evidence by either party on the trial.

8. That the defendants paid taxes on the land sued for
75 continuously since they were located up to the present time.

9. That the defendants paid all the fees of locating and surveying the said lands sued for, as well as for the same number of alternate sections, known as the even numbers, for the public free-school fund.

10. The various engineers appointed by the different governors to inspect railroads, as the same were constructed in their respective reports of inspection to the said governors respectively, stated the number of miles and feet of main track; the number of miles or feet of siding; the number of miles or feet of bridges, culverts, and trestles; the number of depots, cars, engines, weight of iron, and width and character of track and grade. The action of the respective governors (except Governor Roberts) in said reports *were* usually in the following words: "Report examined and approved;" upon which reports and action of the respective governors the com. gen. land office issued to the respective companies certificates for main track and sidings in form as shown in "Exhibit A." During the administration of Governor Roberts the reports of the engineers were in form and substance of those made to other governors, but he approved for only the number of miles of main track stated in the reports. In one instance during the administration of Gov. Davis he approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was also done in one instance by Gov. Hubbard, for which certificates were issued. On March 13th, 1877, Gov. Hubbard made the following endorsement on one of the reports: "This report of Inspector Gray examined and approved for 30 miles main track and sidings, as being made, graded, in all respects complying with the law."

11. All facts herein set forth are admitted for convenience, subject to exceptions as to their legal effect, and cannot be used in any other case.

76 12. Exhibit "D," Governor Pease'-letter, of date March 31st, 1856, to Commissioner Crosby; Exhibit "E," letter of Tipton Walker to Gov. Pease; Exhibit "F," letter from A. Groesbeck, V. P. H. & T. C. R. R. Co., to E. J. Davis, governor; Exhibit "G," letter from E. J. Davis to Jno. W. Glenn, instructing him to inspect road and report; Exhibit "H," report of Jno. W. Glenn, civil engineer, to Gov. Davis, and Exhibit "I," letter from Gov. Coke to J. J. Gross, are to be taken as part of this agreement.

13. That the lands sued for and described in plaintiff's petition are situated in Nolan county, Texas, in what is known as the Pacific reservation, created by special act of the legislature, of date May 2nd, 1873, entitled "An act to adjust and define the rights of

the Texas & Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean." But nothing in this clause of the agreement shall be construed so as to prevent the defendants from providing and establishing their prior right to said lands.

14. That either party may introduce in evidence any certified copies from any of the departments of state or surveyor's office bearing upon this case, subject to exception as to relevancy.

15. Continuously since the adoption of the act of January 30th, 1854, up to Sept. 10th, 1889, patents to lands located and surveyed by virtue of certificates issued to railways for the construction of main tracks and sidings have been issued and delivered, but in no case do any such patents disclose upon their face that the certificates upon which they are based were issued for sidings or switches.

16. That the files and records of the general land office shows that the land- in controversy in this suit were located and surveyed at the time stated in plaintiff's petition.

77

J. S. HOGG, *Att'y Gen'l, &*
 R. H. HARRISON, *Assistant,*
For State of Texas.
 BAKER, BOTTS & BAKER,
 T. D. COBBS, *Att'y- for Def'l.*

"EXHIBIT A."

No. 40,5001.

Land Scrip.

640 acres.

THE STATE OF TEXAS, GENERAL LAND OFFICE.

This is to certify, that the Houston & Texas Central Railway Company having completed a section of ninety-three and one hundred and thirty-two one hundred and seventy-sixth- ($93\frac{3}{6}$) miles of main track, and two and thirty-five sixty-sixth- ($2\frac{5}{6}$) miles of siding from Brenham to Austin city, is entitled, under the provisions of its charter and the general laws governing the same, to six hundred and forty acres of land, to be located upon any of the unreserved vacant and unappropriated public domain of the State of Texas, and surveyed in the following manner: First. Two sections of land adjoining and connecting with each other must be surveyed, one for the State and the other for the company. Second. The surveys to be made square, unless prevented by previous entries or navigable streams. Third. When the field-notes have been returned to the general land office, the commissioner will number the surveys and report the result to the surveyor, who will fill up the blank left in his record for that purpose, accordingly.

(As a matter of convenience, in describing the surveys when reporting the numbers, the surveyor should number the field-
 78 notes temporarily, in pencil.)

Fourth. In dividing the surveys, a fraction of over three hundred and twenty acres will be counted as a whole section, and two fractions of less than three hundred and twenty acres will be

regarded as a section. Fifth. The even numbers will be reserved for the State and the odd numbers to the company.

In testimony whereof, I hereunto set my hand and affix the impress of the seal of said office, this first day of July, 1872.

JACOB KUECHLER,
Commissioner.

"EXHIBIT B."

Letter from Elgin to Kuechler, Commissioner.

AUSTIN, TEXAS, June 19th, 1872.

Hon. Jacob Kuechler, com. gen. land office, Austin.

DEAR SIR: As agent of the Houston & Texas Central Railway Company, I hereby apply for (1,896) eighteen hundred and ninety-six certificates for six hundred and forty acres of land each, being the amount to which said company is entitled by virtue of having completed (110.78) one hundred and ten and $\frac{7}{10}$ miles of main track and (7.72) seven and $\frac{7}{10}$ miles of side track, making (118 $\frac{1}{2}$) one hundred and eighteen and one-half miles on the main line of said railway—that is to say, from the (100th) mile point at the town of Bryan to a point near the depot at Corsicana ($\frac{7}{10}$) seventy-eight one-hundredths of a mile beyond the two hundred and tenth (210th) mile point from the terminus at Houston. * * *

Also for (1,540) fifteen hundred and forty certificates of like character, by virtue of having completed (93 $\frac{3}{4}$) ninety-three and $\frac{3}{4}$ miles of main track and (2 $\frac{5}{6}$) two and $\frac{5}{6}$ miles of sidings on the Western branch of said railway, making (96 $\frac{3}{4}$) ninety-six and $\frac{3}{4}$ miles, and being that portion extending from the town of Brenham to the city of Austin. * * * For evidence of all which, and that the same has been completed in accordance with the charter of said company and general laws regulating railroads in Texas, you are respectfully referred to the several reports of C. D. Anderson, civil engineer, appointed by the governor to examine the main line, and John W. Glenn, civil engineer, appointed to examine the Western branch, copies of which are filed herewith, and the sworn certificates of the several chief engineers engaged in the construction of the road.

Very respectfully,

ROBT M. ELGIN,
Land Ag't, H. & T. C. R. W.

(Filed in the gen'l land office May 26th, '73.)

GENERAL LAND OFFICE,
AUSTIN, TEXAS, July 5th, 1872.

Rob't M. Elgin, Esq., Austin, Texas.

SIR: I have the honor herewith to acknowledge the receipt of a map and profile of the Western branch of the Houston & Texas Central railway from the town of Brenham, in Washington county, to the city of Austin, which have been duly filed.

Yours very respectfully,

JACOB KUECHLER.

"EXHIBIT C."

Howe's Affidavit.

STATE OF TEXAS,
 County of Harris. }

I, M. G. Howe, chief engineer of the Houston & Texas Central Railway Co., hereby certify that the following sections of the Western branch of the Houston & Texas Central railway were completed, with the necessary turnouts and sidings, at or before the dates respectively stated herein, viz: 1st. The first section, extending from Brenham to Ledbetter, twenty-five miles, was completed by the 20th day of January, 1871; 2d, the second section, extending from Ledbetter (25) twenty-five miles to a point six miles east of McDade, was completed by the 15th of September, 1871; 3, the third section, extending from the last-named point (25) twenty-five miles to a point four miles east of Manor, was completed by the 26th day of November, 1871; 4th, the fourth section, extending from the last-named point to the terminus in the city of Austin (18 $\frac{1}{2}$) miles, was completed on the 25th day of December, 1871; and that I was the chief engineer in charge of the work at the time of the completion of the several sections as above stated.

H. G. HOWE,
Chief Engineer, H. & T. C. R. R.

Sworn to and subscribed before me, E. Simmler, a notary public for Harris county, State of Texas, this 27th day of May, 1872.

Given under my hand and seal of office this 27th day of May, A. D. 1872.

[SEAL.]

E. SIMMLER,
Notary Public, Harris County.

Vol. 4, fo. 211, No. 3255.

(Filed in gen'l l'd office May 26, '73.)

"EXHIBIT D."

Governor Pease's Letter.

EXECUTIVE OFFICE, AUSTIN, TEXAS, March 31st, 1856.

S. Crosby, Esq., com. gen'l land office.

SIR: The president of the Buffalo Bayou, Brazos & Colorado Railroad Company notified me a short time since that said company had completed and put in running order a section of twenty-five miles and more of its road; whereupon, there being no State engineer, I appointed, under the provisions of "An act to encourage the construction of railroads in Texas by donations of land," approved January 30th, 1854, Tipton Walker, Esq., of Galveston county, as an engineer to examine said section of road, and I now enclose you a copy of his report under oath, with the affidavits ac-

companying the same, from which you will perceive that he reports the same action (with the necessary turnouts), 32.12 miles, as constructed in accordance with the provisions of its charter and of the general laws of the State in force regulating railroads. In acting upon this report you will bear in mind that this company has already received from this State eight sections of land per mile for nineteen and a half of miles of this road. Consequently it cannot receive under the laws of the 30th January, 1854, but eight sections per mile for said nineteen and a half miles. You will also bear in mind that said company is under no circumstances entitled to receive more than sixteen sections per mile for any portion of its road.

Very respectively,

E. M. PEASE.

Endorsed: B. B., B. & C. R. R. Letter from the governor to commissioner of land office in regard to donation of land.
82 Copy of letter to commissioner land office, March 31, '56. Recorded on page 453.

"EXHIBIT E."

Letter from Walker to Pease.

HARRISBURG, TEXAS, March 24th, 1856.

His Excellency E. M. Pease, governor of Texas.

SIR: In compliance with the instructions contained in your letter under date of the 14th inst., I have examined and inspected the first and second sections of the Buffalo Bayou, Brazos & Colorado railroad, and would now most respectfully submit the following report of my inspection:

The first section of the road, between Harrisburg and Staffords Point, a distance of nineteen and a half miles, having been previously inspected and reported upon by a commissioner specially appointed for the purpose, renders it only necessary on my part to confirm the accuracy of the commissioner's report and to say that after two years' use I found it in good working order and to present a *must* better appearance than I anticipated.

In some places cross-ties (although on this section all are of cedar and post oak) were very much decayed and the road in rather bad condition in consequence of the incessant rains that have fallen during the last two months, and that, too, at a time when the greatest amount of business was being transacted. I found workmen on the top busily engaged in repairing damages and substituting new ties where they were necessary. I have no doubt that after a few days fine weather this section of the road will present as good appearance as it has at any time previously.

The decay of the ties in so short a period of time is at-
83 tributable to the fact that this section of the country is almost
destitute of timber suitable for good ties, rendering it necessary to use an inferior quality which soon gives away under the deteriorating influences of the climate, etc.

The second section of the road, from Staffords Point to the Brazos river, a distance of twelve and a half miles, is in the main good. There are some unsightly portions, owing to the frequent rains and the nature of the earth composing the road-bed, which in wet weather becomes very soft and yielding and the superstructure necessarily gets out of adjustment from the action of the train going over it whilst in this condition. This will in a great measure be remedied when the road is well "ballasted." Proper material for this purpose cannot be had in this section, and I suppose the road will have to remain without permanent ballast until when in the farther prosecution of the work the road reaches a section where suitable material can be obtained.

In your letter of instructions my attention is particularly called to the following points, viz:

1st. Whether that section of the road completed since the 30th January, 1854, has been constructed with rails weighing at least fifty-four pounds to the yard.

2nd. "The actual length of the road completed."

3rd. "How much of it was completed and in running order by the 11th of February, 1854?"

4th. "How much of it was completed and constructed previous to 30th January, 1856?"

5th. "Whether said road has been completed in a good and substantial manner."

To these interrogatories I have to reply that no iron of less weight than fifty-four pounds per yard has been used in the construction of any part of this road, the average weight being

84 about sixty pounds per yard. I had no opportunity of weighing the iron at the time of my inspection, but a large portion of it passed the custom-house at the time of its importation under my supervision and in consequence its weight was well known to me. The entire road from Harrisburg to the Brazos river at Richmond is now completed and in running order. The times when the different sections were so completed and the length of these sections — by the affidavits annexed.

I did not personally measure the length of the track and sidings, although I passed over them, being satisfied that it was correctly stated in the affidavit of John W. Stump, formerly the assistant engineer of the company, which I caused to be made and to be hereto annexed. I also confirm the statement made in the affidavit of John A. Williams, chief engineer, in respect to the amount and character of the equipment and other appurtenances of the road, so far as my general observation enables me to judge.

By reference to the affidavits of J. W. Stump, W. J. Kyle, and B. F. Terry, herewith accompanying, it will be seen that twenty miles was completed prior to the 11th of February, 1854, and twelve miles and $\frac{1}{2}$ have been completed since that time and previous to the 30th January, 1856.

The next point is as to whether the road has been completed in a good and substantial manner. To this I have to say that the road does not in all respects conform to my ideas of "a first-class

road," but — the absence of any specifications on the part of the State as to what constitutes a first-class road or even a "good and substantial one," and in a section of country like this, where the work had to be prosecuted under so many natural disadvantages, as, for instance, want of suitable timber for cross-ties, a flat, level prairie, where it is difficult to keep up a proper system of drainage, a soil so soft that after the slightest rain the embankment yields to the pressure of the train going over it and with no material for ballasting, it would be unfair to subject this section of the road to a rigid criticism, and which I do not feel disposed to make. The rails, chairs, and spikes are certainly "first class," being in my opinion quite equal to the average used through the Union, and notwithstanding the first twenty miles have been in use for about two and a half years scarcely any wear of the rail is perceptible. I am therefore inclined to the opinion that under a fair construction of the terms the road has been constructed in a good and substantial manner, and that it fully answers all the purposes for which it was intended. The statement in the affidavit of the chief engineer that the trains have run regularly without accident and have done all business that has offered itself, and indeed a larger business than was perhaps to have been inspected, is the best proof that I have to offer for the correctness of my conclusion. So far as I am able to judge, I find nothing in the operation of the company but what is in conformity with the provisions of the charter and in accordance with the laws of the State with regard to railroads. In conclusion, I have to say that the foregoing report contains all the information I have been enabled to obtain in the course of my examination.

When it was necessary to take affidavits of persons as to facts which were not personally known to me I have obtained the testimony of reliable and credible gentlemen with whom I am acquainted. I have as far as possible given categorical answers to your interrogatories, besides such other facts as might be of use to you in determining whether the road is entitled to receive from the State the donation of land which is claimed for it.

I am, sir, with highly respect, your obedient servant,

(Signed)

TIPTON WALKER.

Sworn to and subscribed before me this 24th March, 1856.
Witness my hand and notarial seal, at office, in Houston.

[L. S.]

(Signed)

J. B. DART,
Notary Public, Harris County.

Letter from Groesbeck to Davis, Governor.

Office of the Houston and Texas Central Railway Company.

HOUSTON, February 9th, 1872.

To His Excellency Edmond J. Davis, governor of the State of Texas,
Austin.

SIR: In behalf of the Houston and Texas Central Railway Company the undersigned has the honor to report the said company has completed and put in running order that additional part extending from the town of Bryan, in Brazos county, to the town of Corsicana, in Navarro county, of its main trunk of road, which additional part includes one hundred and ten miles or four sections of twenty-five miles each and ten miles in length of road.

And that it has also completed and put in running order that additional part extending from the town of Brenham, in Washington county, to the city of Austin, in Travis county, of the Western branch of its main trunk road, which additional part includes ninety-three miles or three sections of twenty-five miles each and eighteen miles of road.

And the said company now respectfully asks that Your Excellency will intrust the engineer appointed by the State to examine the above-mentioned parts of road and report thereon, as provided by law.

Very respectfully, Your Excellency's obedient servant,

(Signed)

A. GROESBECK, V. P.

"EXHIBIT G."

Instructions to Glenn.

To Col. Jno. W. Glenn, civil engineer:

Whereas the "Houston and Texas Central Railway Company," by A. Groesbeck, vice-president thereof, has made known to me that said company has completed and put in running order that additional part extending from the town of Brenham, in Washington county, to the city of Austin, in Travis county, of the Western branch of its main trunk road, which additional part includes ninety-three miles or three sections of twenty-five miles each and eighteen miles of road, you are, therefore, hereby empowered and directed (there being no State engineer) to examine said ninety-three miles of road and report under oath if the same has been constructed in accordance with the provisions of the charter of said company and of the general laws of the State of Texas in force regulating railroads; but this appointment, as in case of other similar appointments made by me, is not to be understood as an admission on the part of the State of Texas of the right

of said company to a grant of lands or as a waiver of any legal or equitable defense which the State of Texas might set up against the claim of said company to such grant of lands.

Given under my hand as governor of the State of Texas and the seal of said State, at the executive office, in the city of Austin, this 12th day of February, A. D. 1872.

(Signed)

EDM'D J. DAVIS, *Governor.*

By the Governor:

(Signed)

JAMES P. NEWCOMB,
Secretary of State.

"EXHIBIT II."

Report of Glenn.

AUSTIN, February 21st, 1872.

His Excellency E. J. Davis, Governor of Texas, Austin, Texas.

88 GOVERNOR: I have the honor to report that in obedience to the commission from you dated February 12th, A. D. 1872, I have carefully examined that part of the railroad owned by the Houston and Texas Central Railway Company lying between the town of Brenham and the city of Austin, Texas, and find between those points ninety-six $\frac{4}{5} \frac{7}{8}$ miles of railroad, which has been constructed according to the provision of its charter and the general railroad laws of the State. The road was located in sections of twenty-five miles and its fractions, giving for each twenty-five miles 1,320 location stations of one hundred feet each. For convenience I use these stations as reference instead of miles, and will letter the series "A," "B," "C," and "D."

SERIES "A."

Station No.	50	7 spans trestle, 16 feet each.
	66	7 " " " " "
	117	7 " " " " "
	137	7 " " " " "
	157	10 " " " " "
	198	3 " " " " "
Little Sandy,	214	5 " " " " "
	228	5 " " " " "
	238	1 wood culvert.
Big Sandy,	255	10 spans trestle, " " "
	290	7 " " " " "
	311	7 " " " " "
	320	5 " " " " "
Mill creek,	356	26 " " " " " and one trussel string of 40'.
	392	Stone culvert box.
	403	" " open.
	418	" " box.
	425	Open.

	431	Open culvert, stone piers, and truss strings 22' long.
	437	Open culvert, stone piers, and truss strings 22' long.
	470	Open culvert, stone piers, and truss strings 31' long.
	480	Stone culvert box.
	487	" " "
	508	7 spans trestle, 16' each.
Spring branch,	541	4 " and truss strings 22' long.
	555	Stone culvert box.
	559	" " "
	563	" " "
	575	" " " open.
89		
Roberts creek,	590	Trussed strings 22' long on stone piers.
Indian creek,	604	9 spans of trestle, 16' each.
	645	Wood culvert.
	667	Turnout, 2,000' feet long.
Burton,	680	3 spans trestle, 14' each.
	706	3 "
	725	3 "
	737	10 "
	753	7 "
Head Indian creek, Cedar,	783	Wood culvert.
	792	" "
	802	3 spans trestle, 14' each.
	817	3 "
	833	Wood culvert.
	855	" "
	865	3 spans trestle, 14' each.
	871	3 "
Crossing Cedar creek,	894	16 "
	906	4 "
	917	5 "
	927	Wood culvert.
	930	Wood culvert.
	938	8 spans trestle, 14' each.
	966	Wood culvert.
	1037	5 spans trestle, 14' each.

Between stations 1037 and 1171 are 4 wood culverts; at 1171 are 3 spans trestle, 14' each, and 5 wood culverts between that and station No. 1320, end of first twenty-five miles.

SERIES "B."

Ledbetter, station No. 200		Turnout, 2,893 feet long; 2 wood culverts.
230		Water tank; 2 wood culverts.
282		4 spans trestle, 14' each; 5 wood culverts.
387		3 spans trestle, 14' each.
432	2	"
452	2	"
Giddings,	508	2 wood culverts and 2,535' <i>feet</i> turnout; 1 wood culvert.
	540	3 spans trestle, 14' each; 2 wood culverts.
	570	Section-house.
Station No. 586		2 spans trestle, 14' each; 1 wood culvert.
612		4 spans trestle, 14' each.
632	4	"
681	2	" 1 wood culvert.
	707	3 spans trestle, 14' each; 1 wood culvert.
	736	4 spans trestle, 14' each.
	764	4 spans trestle, 14' each.
	786	6 "
90	800	5 " 3 wood culverts; 1 section-house.
	815	3 spans trestle, 14' each.
		2 wood culverts.
	828	2 spans trestle, 14' each.
	840	3 spans trestle, 14' each.
	864	3 " 5 wood culverts.
	903	7 spans trestle, 14' each.
		2 wood culverts.
	928	5 spans trestle, 14' each.
		1 wood culvert.
	1297	Section-house.
	1306	Water tank.
	1307	6 spans trestle, 14' each.
		2 wood culverts.
	1320	End of section twenty-five miles.

SERIES "C."

96	3 spans trestle, 14' each.
114	5 "
158	3 "
165	2 "

Wood culvert.

	210	3 spans trestle, 14' each.
	220	3 " "
		2 wood culverts.
	231	3 spans trestle, 14' each.
	272	3 "
		Section-house.
McDade,	317	6 spans trestle, 14' each.
	344	Turnout, 1,409 feet long.
	360	3 spans trestle, 14' each.
	368	5 "
	396	3 "
Mchaughlins creek,	433	15 "
	462	3 "
	492	6 "
Britton creek,	504	3 "
	514	5 "
	530	7 "
Big Sandy,	563	40 "
		Water tank and one truss-string open- ing 35' feet long.
	580	4 span-trestle, 14' each.
		3 wood culverts.
	650	Section-house.
	653	3 spans trestle, 14' each.
Section No.	672	2 wood culverts.
	708	3 spans trestle, 14' each.
Spring branch,	735	3 "
	9	"
		1 wood culvert box.
	756	4 spans trestle, 14' each.
	767	3 spans trestle, 14' each.
	790	4 "
	800	3 "
	820	3 "
	832	3 "
	853	3 "
	895	Section-house.
Little Sandy,	902	9 spans trestle, 14' each.
	942	3 "
91	950	4 spans trestle, 14' each.
	970	5 "
	987	3 "
	1009	3 "
	1014	3 "
	1029	4 "
	1040	3 "
	1048	3 "
	1054	4 "
		1 wood culvert.

THE STATE OF TEXAS.

	1085	6 spans trestle, 14' each.
Willow creek,	1132	6 " "
Dry creek,	1146	3 " "
Cotton Wood		Section-house.
creek,	1190	28 spans trestle, 14' each.
	1209	27 "
	1236	38 "
	1252	3 "
	1235	3 "
	1295	5 "
	1318	4 "
	1320	End of third twenty-five miles.

SERIES "D."

	79	8 spans trestle, 14' each.
Wilbargers creek,	92	7 "
	140	11 "
	163	36 "
		Water tank & section-house.
Manon,	205	2 wood culverts.
		Turnout 1,818' long & water tank.
Gillelands creek,	229	1 wood culvert.
Roundtree branch,		31 spans trestle, 14' each.
	261	19 "
	277	5 "
	284	4 "
	288	8 "
	290	6 "
	293	Wood culvert.
	309	3 spans trestle, 14' each.
	317	5 "
	329	6 "
Deckers creek,	358	12 "
Station	429	Wood culvert.
	462	4 spans trestle, 14' each.
	478	3 "
	502	8 "
	509	Section-house & stone culvert box.
	537	13 spans trestle, 14' each.
	605	25 "
	648	10 "
	658	5 "
Big Walnut,	708	36 "
		2 truss-string openings, 27' each.
		1 Howe truss bridge, 85' long, resting on frame piers supported by piles.

	735	13 spans trestle, 14' each.
92	747	3 "
	749	4 "
	751	4 "
	754	5 "
	759	9 "
	762	5 "
	775	Section-house.
	779	23 spans trestle, 14' each.
	801	6 "
	817	7 "
	850	5 "
	892	3 "
	932	3 "
	948	Water tank.
	969	17 spans trestle, 14' each. 2 wood culverts. Turnouts, 2,705' long.
Austin,	990	End of track near Congress avenue.

Recapitulation of Distances.

1st section, "A" series	25 miles.
2nd "B"	25 miles.
3rd "C"	25 miles.
4th "D," 990 stations.....	18 $\frac{5}{6}$ —.
Sidings at Burton.....	2,000 feet.
Ledbetter.....	2,893
Giddings.....	2,535
McDade	1,409
Manor	1,818
Austin.....	2,705
	13,369
	$2\frac{5}{6}$ miles.
Total.....	96 $\frac{407}{452}$ miles.

Just where the general laws of the State of Texas cease in their requirements for construction and just when they begin in their requirements for management is a question which caused me much study and reflection before I could come to such a conclusion as would admit of no reasonable doubt.

In the matter of construction the State protects herself from imposition by an ability to withhold aid promised, while in the matter of management she has by her general laws imposed special penalties for the violation of those laws.

Mile-posts and sign-boards are required by the general laws; yet they are no more a part of the construction of the road than 93 officers' badges, section-houses, tanks, &c. They are, however, necessary in the management of the road, and for their absence and that of badges, &c., the laws provides special penalties.

With that conclusion arrived at, I confined myself exclusively to a consideration of such requirements of the laws as relate to the construction of the road as explained to me by the executive officer of this road. Its policy has been to employ to the utmost its resources of money and credit, and with those resources build the greatest number of miles of railway in Texas practicable, reasonably expecting to replace by permanent work such temporary portions as wood culverts, trestle-work and pile and frame supports for bridges before the decay of the same out of the earnings of the road.

I regard this plan as entirely practicable, and if it will add additional miles of railroad and facilities to Texas it certainly is to be recommended.

To carry out these views their chief engineer adopted as the maximum grade one and one-tenth per cent., and within that limit, in order to save in the expense of embankment and excavation, has, as far as practicable, followed the surface meanderings of the country. As a consequence the average amount of earth-work per mile is small. The general line of location from Brenham to Austin I regard as the best that could be made. The minor defects in the details of location *and* beyond the jurisdiction of the present laws of the State of Texas. It is, perhaps, well that they are, for after a road is completed it is exceedingly easy to criticize and too often unjustly condemn. The rail used is of the most approved pattern, and weight fifty-six pounds to the lineal yard. From Brenham to a short distance beyond Burton the railroads are connected by a chair; the remainder of the distance the fish-bar connection is used.

The ties are standard, both as to quality and dimensions and 94 number per mile. The equipment of the road with station-houses, section-houses, water tanks, wood yards, and rolling stock is about completed. Regarded as temporary, the wood culverts, trestle-work, truss springs, and framed supports for the bridges are equal to the standard of temporary work. The condition of the road-bed is fully up to the average and is being improved every day. For the foregoing reasons it affords me pleasure to certify that for the ninety-six and $1\frac{7}{8}$ miles ($96\frac{7}{8}$) of road inspected the Houston & Texas Central Railway Company has complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

I have the honor to remain, your most ob't servant,
 (Signed) JOHN W. GLENN,
Civil Engneer and Commissioner for the State.

Sworn to and subscribed to before me this 24th day of Feb'y, 1872.

(Signed) L. W. COLLINS,
 [L. S.] *Notary Public, T. C.*

EXECUTIVE OFFICE, STATE OF TEXAS,
 AUSTIN, February 19th, 1874.

SIR: I have to inform you that according to the report of the State agent appointed to inspect and survey the Texas & Pacific

railroad eight and five-tenths ($8\frac{5}{10}$) miles of main and single track and of necessary turnouts have been surveyed and inspected and the surveys accepted by me as satisfactory.

Herewith please find certified copy of said report.

Very respectfully,
(Signed)

RICHARD COKE, Gov.

To Hon. J. J. Gross, com'r gen'l land office.

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"EXHIBIT I."

Letter, Coke to Gross.

EXECUTIVE OFFICE, STATE OF TEXAS,
AUSTIN, TEXAS, Sept. 27th, 1876.

Hon. J. J. Gross, com'r gen'l land office.

SIR: I have to inform you that according to report of H. L. McClung, agent of the State of Texas appointed to inspect and survey the Transcontinental branch of the Texas & Pacific railroad, that one hundred and seven miles (107 m.) and twenty-two hundred and five (2,205) feet of road-bed and four (4 m.) miles and three thousand four hundred and fifty (3,450 ft.) feet of sidings have been surveyed and inspected and the report approved, a certified copy of which please find enclosed.

Very respectfully,
(Signed)

RICH'D COKE, Gov.

The State here rests.

RECORD OF CAUSE IN U. S. COURT.

Defendants' Testimony.

Defendants offer and read in evidence the printed record in consolidated cause No. 198, in equity, in Galveston, Nelson S. Easton *et al.*, trustees, vs. The Houston and Texas Central Railway Company *et al.*, defendants, pending in United States circuit court for the eastern district of Texas, at Galveston, which shows—

First. That all the property of the Houston & Texas Central Railway Company, of every kind and description whatever, was placed in the hands of Charles Dillingham, Nelson S. Easton, and James Rintoul, joint receivers of said railway company, in 1885.

Second. A decree entered in said cause, dated the 4th day
96 of May, 1888, foreclosing all the mortgages embraced and covering, among other property, the said property sued for of the said railway company; which mortgages are as follows:

- (1.) Mortgages dated July 1st, 1866.
- (2.) Mortgage dated December 21, 1870.
- (3.) Mortgage dated October 1, 1872.
- (3a.) Mortgage dated May 1st, 1875.
- (4.) Mortgage dated May 7, 1877.

(5.) Mortgage dated April 1, 1881.

Amount of indebtedness for which the property was foreclosed and ordered to be sold, embraces in the mortgages, amounted to \$16,823,000.

In said decree Charles Dillingham was appointed master commissioner and authorized and directed to sell the railway, franchises, and all of its lands, &c.

Report of Master on Sale to Olcott.

Defendants also read in evidence report of Charles Dillingham, as special master commissioner, the sale of all of said property to Frederick P. Olcott; which report recited payment by Olcott to him of the consideration purchase price, being \$10,580,000, he being the highest bidder; which report was filed on the 26th day of September, 1888. The report recited that the sale was made on the 8th day of September, 1888.

Order Confirming Sale to Olcott.

Order of the court confirming sale of said railway of December 4, 1888, which directed said Charles Dillingham, as master commissioner, to make and execute a deed to Frederick P. Olcott, the purchaser of said property, reciting the consideration therefor as being paid, and further directed as further assurance of the title that the railway company also join in said deed, which was accordingly done.

The deed of Charles Dillingham, special commissioner, to Frederick P. Olcott, reciting the payment of the sum of \$10,580,000 and confirmation of such sale, &c., and conveying to him all the property of said railway company; which deed was executed by the said Charles Dillingham and by the Houston and Texas Central Railway Company through its proper officers. Said deed dated the 18th of January, 1889, and was executed, acknowledged and delivered, and recorded in Nolan county.

File Made on Lands by Defendant-.

Defendants also introduced in evidence the file made by the Houston and Texas Central Railway Company upon said lands, dated July 28th, 1872; which file was as follows, together with the certified copy of the land office map, which original map, by consent of the parties, may be sent to the court with the transcript without having the same recopied:

STATE OF TEXAS, }
 County of Bexar. }

To the surveyor of Bexar district:

By virtue of fu-ty certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your district, to wit: On the waters of the Colorado and Clear fork of the Brazos in Taylor county, beginning at the S. E. corner of John Trussell's $\frac{1}{2}$ league near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner, and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence east-
 98 ward to and with Lunicki to or — Martinez's N. E. corner; thence S. E. with Martinez's, C. Colenck, Ed. Taylor, and James Jeffries' E. lines to David Harrison; thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Lissey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, Tos. Linsey, and Elish Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the John Fobes survey; thence north with Forbes, C. M. Jackson, W. F. Sparkes, Rob't Triplett, and John Kineade to N. W. corner of the latter; thence east with Kineade and Triplett to Smith league, and with its W. and N. lines to the N. E. corner on the line between Bexar and Travis district; thence N. W. with said line to the beginning.

ROB'T M. ELGIN,
Land Agent H. & T. C. Railway.

All valid subsisting entries and surveys are hereby excluded from the above as well as the rocky summits of mountains in vicinity of Mountains pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, page 131.

C. HARNETT, *D. L. B. D.,*
 By L. C. NAVARRO, *Dep.*

I, W. M. Lock, district surveyor, Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pages 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor, Bexar District.

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GENERAL LAND OFFICE,
AUSTIN, TEXAS, March 24th, 1892.

I, W. L. McGaughey, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written.

[SEAL.]

W. L. McGAUGHEY,
Com'r G'l L'd Office.

Deposition of R. M. Elgin.

Defendants introduced the deposition of R. M. Elgin.

Answers of the Witness R. M. Elgin.

I.

My name is Robert M. Elgin; am employed in the stationery, printing, and blank-book-making business, residing and doing business in Houston, Harris county, Texas. I have occupied official positions in the general land office of Texas; was connected with it for nearly eighteen years, from early in 1848 to the summer of 1865. For the first four years I was assistant clerk; for the remainder of the time I was chief clerk, more than thirteen years, from 1852 to 1865. In the former capacity I was at first employed for about two years in the patenting-room and about two years as receiving clerk. While acting as chief clerk I had general supervision of the details of the office in all its departments; passed upon applications for patents and for land. When the commissioner was present I was the second officer, and in his absence acted as commissioner.

II.

During the time that I was employed in the land office several railroads received special grants of land from the legislature, 100 but the most important law on the subject was the act to encourage the construction of railroads in Texas by donation of land, approved January 30th, 1854. Nearly all the land certificates granted to railroads while I was connected with the office were granted under that act, and certificates were granted to railroads for sidings.

III.

I have a distinct recollection of the question of the right of a railroad company to acquire lands on sidings having arisen in the first application for land certificates made under the act of 1854. My recollection is more distinct in regard to this circumstance than ordinarily from its importance, the careful attention which I gave it, and the fact that it was the first application under a law about which a great deal had been said and which was of unusual note.

riety. I remember that Mr. Barnett, the president of the Buffalo Bayou, Brazos and Colorado Railroad Company, presented the application in person for land certificates on a portion of said road. The report of the State engineer who examined the road was made to Gov. E. M. Pease and was sent by him to the land office, accompanied with an autograph letter from the governor to the commissioner, in which he reminded the latter that the company has received already eight sections per mile under its charter on a part of the road, which were to be deducted from the sixteen sections per mile to which it would otherwise be entitled under the general law. The commissioner being absent, it devolved upon me, as chief clerk, to receive and act upon the application. After examining the report of the engineer I figured up the number of certificates to which I supposed the road was entitled, deducted the certificates already received, and remarked to Mr. Barnett that the road was entitled to so many sections, showing him the calculation;

101 the exact number I do not now remember. "But," said he,

"we are entitled to certificates also on the sidings." I told him I reckoned not. He asked me if I had examined the statute. I replied that I had, but not with reference to this particular question; that I would do so, however, before issuing the certificates. I accordingly studied the whole act entitled "An act to encourage the construction of railroads in Texas by donation of land," and especially the section to which my attention had been called by Mr. Barrett. After mature consideration I came to the conclusion that the legislature intended to grant land for necessary sidings as well as main track and construed the act accordingly. Whether the decision was right or not, it was made deliberately, honestly, and conscientiously, after careful examination of the act and upon the direct question of the construction to be placed upon the 12th section of the act. I then drew up a form of certificate which, if I remember rightly, stated the number of miles of main track and sidings upon which the lot of certificates were issued. That form, I believe, was followed, if not literally, without material change, by both the land office and the court of claims as long as the law was in force. Stephen Crosby was commissioner of the land office at that time. He returned before the blanks were ready for signature and ratified my action by signing the certificates as I had drawn them. The same construction was followed by other land commissioners and by the court of claims, and the issuance of certificates on sidings was authorized by every governor to whom application was made as long as the act of 1854 was in force.

IV.

The following governors authorized the issuance of certificates on sidings:

- 102 Gov. E. M. Pease, to the B. B., B. & C. Ry Co.
 Gov. H. R. Runnels, to the S. P. R. R. Co. and to the S. A.
 & M. G. Ry Co.
 Gov. Sam. Houston to the S. P. R. R. Co. and the W. Co. R. R. Co.

Gov. Edward Clark, to the W. C. R. R. Co. and the B. B., B. & C. R'y Co.

Gov. J. W. Throckmorton, to the T. & N. O. R. R. Co. and W. C. R. R. Co.

Gov. E. J. Davis, to the G., H. & S. A. R. R. Co.; G., H. & H. R. R. Co., Indianola R. R. Co., Texas & Pacific, H. & G. N. R. R. Co., H. & T. C. R. R. Co., and W. & N. W. R. R. Co.

Gov. Richard Coke, to Texas & Pacific R. R. Co., H. & G. N. R. R. Co., G., C. & S. F. R. R. Co., and G., H. & S. A. R. R. Co.

And Gov. Hubbard to a large number of companies.

Land certificates were issued upon sidings by the following commissioners of the general land office: Stephen Crosby, F. M. White, Jacob Keuchler, and J. J. Gross. They were all the commissioners elected while the act of 1854 was in force. Certificates were also issued on sidings by the court of claims to the B. B., B. & C. R. R. Co., the Washington County R. R. Co., and perhaps to some other company. I will name some of the roads to which the several commissioners issued certificates on sidings: S. Crosby, to the B. B., B. & C. R'y Co., in Gov. Pease's term; S. Crosby, to the T. & N. O. R'y Co. and Washington County R. R., in Gov. Throckmorton's term; F. M. White, to the S. A. & M. G. R. R. Co., in Gov. Houston's term; Jacob Keuchler, to the H. & T. C., G., H. & H., and H. & G. N. R. R. Co.'s, in Gov. Davis's administration, and to other companies; J. J. Gross, to T. & P., G., C. & S. F., and Texas Western, in Gov. Coke's administration. From long experience in the State

land office, and a still larger experience in the land offices 103 of some of the railroads, thrown among land men in the land department of the State and officials of the various railroad land offices, I had opportunity of obtaining a general knowledge of the facts stated above, and about two years ago I had occasion to make a pretty thorough examination in the land office and office of the secretary of state to find out what was on record in their offices in regard to the issuance of certificates on sidings, and I have availed myself of data acquired in that examination in answering these interrogatories.

V.

My observation is that it has been the uniform custom to issue certificates on sidings. I have stated above and shown that every elected commissioner of the general land office who served while the law was in force has done so, and almost every governor has authorized it. So far as my personal knowledge is concerned, I have stated the facts in regard to the issuance of the first certificates on sidings. In 1872 I applied for certificates on sidings for the H. & T. C. R'y Co. I concealed nothing, but made application — writing, stating the number of miles of main and side track completed, and the number of certificates applied for. I believe that I referred the official land office to the section under which we claimed them when I made the first application. I know that I pointed out the 12th section of the law of 1854 to State Engineer Glenn, and that he

referred to the section of the law in his report, so that in the case of Gov. Davis and Commissioner Keuchler the question was distinctly brought to their attention, and the certificates were issued with full knowledge of the law and could not have been issued inadvertently.

Answers of the Witness R. M. Elgin to Cross-interrogatories.

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X 1.

I have stated in my answer to the first direct interrogatory that I was connected with the general land office from 1843 to 1865, and what capacity and my duties.

X 2.

I quit the service of the State in the year 1865—in the summer of that year. For several months after that was unsettled in business. In 1866 I became the land agent of the Texas & New Orleans Railway Company, but at the end of the year resigned and accepted the same position with the Houston and Texas Central Railway Company. I continued with that company from Jan'y 1st, 1867, until July, 1891, when I resigned to go in present busiess.

X 3.

My answers show, if I have made myself understood, that in all except the fourth direct interrogatory I have made the statement from personal knowledge of the fact, and in my answers to the fourth interrogatory I had availed myself of information obtained from the general land office and the secretary of state's office in giving particulars of which I had only general knowledge. I had some recollection of the action of State officials in issuing certificates and acting upon applications therefor during the time I was chief clerk in the general land office. I had acted as agent for the lands of the Houston and Texas Central, the Washington County, and the Texas and New Orleans and Waco and Northwestern Railway Companies, and had been for more than a year in the service of the land department of the Southern Pacific Company, which embraces in its system the Galveston, Harrisburg & San Antonio—including what was formerly the Buffalo Bayou, Brazos and Colorado railroad and the Columbia Tap R. R.—the Texas and New Orleans R. R.,

105 the New York, Texas and Mexican R. R., and the Gulf, West

Texas and Pacific railway, which includes what was originally the San Antonio and Mexican Gulf railway. My relations with the landmen of the Texas and Pacific railway and the International and Great Northern R. R. were such that I had pretty accurate knowledge of the history of their lands, and the information that I received by the examination in the offices above referred to furnished me with particulars of which I had only a general knowledge, and refreshed my memory in regard to facts about which my memory was not clear; but facts recurring since my connection with the State government, 1865, in regard to other roads

than those mentioned, if not stated as of my own knowledge, or from information acquired from the files and records. I have stated that the Texas and New Orleans R. R. Co. receives certificates on sidings. I was land agent of that company twice, but was not at the time these certificates issued. They were obtained and sold during the interregnum between the time I was first and last land agent of the company. I learned that Land Commissioner McGaughey has stated that certificates did not issue to that road on sidings. My memorandum, however, agrees with my previous expressed opinion to the contrary—that is to say, the memoranda taken from the records of the land office or secretary of state's office—and I think he is mistaken. I never prepared a paper for any one purporting to be a "statement from the records of the land office as to when the Houston & Texas Central Railway Company was completed in sections, what lands were granted to it, when they were granted, and whether sidings were included in the grants, and otherwise giving a full and detailed account of the matters pertaining to these questions." I have no doubt that at different times I made statements to the officers of the company or

the attorneys containing the information in regard to all or 106 most of the items enumerated, but I never made a statement in which they were all embraced. I informed the attorney general some months ago that I had previously prepared a statement in regard to the date of completion of the road to the several prominent points thereon, but in that statement there was no allusion to lands or sidings, nor did it purport to have been made from the records of the land office. In the twenty-fifth year that I was in the land office of the company I prepared scores of statements in regard to the lands, but I have none of them in my possession nor any copies, so that if I knew which one was referred to I could not furnish copy.

X 4.

As stated in answer to direct interrogatory No. 3, the application was made by the president of the company in person, and, so far as I remember, there was no correspondence in regard to it, and the decision was evidenced only by the issuance of the certificates.

X 5.

Certificates were issued to the Buffalo Bayou, Brazos & Colorado Railway Company on a section of thirty-three miles, extending westerly from Harrisburg to the Washington County railroad, on the road from Hempstead to Brenham or on a part thereof. I am not certain that all of its certificates were issued before I left the land office, nor am I certain that they were issued prior to 1864. They were issued before that date, according to the best of my recollection and belief. I have handled the certificates, but do not remember the exact date. Certificates were also issued to the San Antonio & Mexican Gulf railroad. They were issued for portions of road leading into Port Lavaca. I examined and passed upon the application and prepared the form of certificate, if I am not

107 mistaken, and I do not think I am, but I do not remember the exact date of these certificates nor of those issued to the B. B., B. & C. R. R. Co. There was nothing connected with the issuance to fix the dates upon my mind, and without some collateral fact connecting the issuance with some fixed date I would not likely recollect it.

X 6.

My testimony is not based entirely upon examinations made in recent years of the records of the state department, neither were the facts recently discovered. Some of the facts stated have been known to me thirty-five years, others about twenty years. In regard to the matter in which the information was required, I refer to my answers to the fourth direct and the third and fourth cross interrogatories. As to who were the governors, I answer from memory entirely, not having access at this time to any documentary evidence. Gov. E. M. Pease was first elected, I believe, in 1853, and he was in office when the act of 1854, entitled "An act to encourage the construction of railroads in Texas," was passed. It was one of the leading measures of his administration. He was re-elected in 1855. Gov. Runnels succeeded him in 1857. Gov. Houston was elected in 1859, and was deposed about the first of March, 1861, and Lieutenant Gov. Clark became governor. Gov. Lubbock was elected in 1861 and was succeeded by Gov. Murrah in 1863, who served until the "break up" in the summer of 1865. I have stated in my answer to fourth direct interrogatory which of the governors authorized the issue of certificates on sidings. I never knew or heard of any application for land under the act of 1854 being refused any railroad company on account of its being for sidings, and I believe I have examined every application on file, both in the state department and general land office. I do say, as a fact within my personal knowledge, that between the years 1854 and 1864 one or 108 more applications for land certificates which included sidings were approved by the governor, and, from my own examination, that the practice was uniform and without exception.

X 7.

I held the position of land agent for the Houston & Texas Central Railway Company in June, 1872, and I refer to my answer to cross-interrogatory No. 2 for the time I was so employed. In that year I applied for 3,430 certificates, more or less, for completed road in the H. & T. C. main line and Western branch.

My application was in writing, and I suppose it is now on file in the general land office and will show for itself. Not having seen it for many years, I cannot say how it was worded. If it said anything about the law under which the certificates were claimed it simply asked for the land to which the company was entitled under its charter and the general laws donating lands to railroad companies, without specifying any particular act. This seems to be as definite an answer to the interrogatories as I can well make. It is what I answered in the former deposition. I had no desire to evade

answering it as fully as was warranted by the facts. So far as I know, the company was never called upon to elect any particular law under which it should claim lands and never did. I stated or intended to state in my answer to the fifth direct interrogatory that I called the attention of the engineer who examined the road in 1872 to the twelfth section of the act of 1854 to show him that we were entitled to land upon sidings, and that he referred to that section of the law in his report. I may have referred the commissioner or the chief clerk of the general land office to the same section to show that the company was entitled to lands on sidings. That was the only reference to any particular law under which the company claimed of which I have any knowledge. This, as will be seen by the context, was with reference to sidings. I have consulted 109 no attorney nor any other person in regard to my answer to this or any other interrogatory.

X 8.

The application for the 3,430 certificates was the first that I ever made. In it I asked for certificates on sidings as well as main track, and they were issued as applied for. Application for certificates on main track from Millican to Bryan was made after I became connected with the company and prior to this; but I do not think I made the application. No land certificates were asked for on sidings in that application.

X 9.

I was not residing in Houston nor connected with the Houston & Texas Central railway when the first and second sections were built. From some data, to which I have access at present and suppose to be correct, it was completed to Cypress, 25 miles from Houston, in September, 1856, and to Hocklye, 15 miles from Cypress, in December, 1857, and to Hempstead, 10 miles from Hockley, in June, 1858. I remember being at Hempstead July 4th, 1858, and that the road had just been completed a short time previously to the place.

X 10.

I have no data from which I can give the dates of construction of sidings on the H. & T. C. railway. I was never engaged in the construction or operating departments of the road, and therefore am not so familiar with matters of this kind as those in the department in which I was employed and cannot give exact data from my general knowledge of the road. I would say the sidings at Richardson were made in 1872 or 1873. As to Ferris, I am of the 110 opinion that the sidings were put in after the road had been completed to some point beyond. If the company received certificates on them, they were built in 1872 or 1873; at Bryan and Wellborn in 1867; at Millican and Navasota in 1859 or 1860. I was at Millican in June, 1861, and the road was running to that place. At Courtney and Howth in 1858, 1859, or 1860; at

Hempstead in 1858; at Waller, I do not know, but it was prior to 1860; at Hockley in 1857 or 1858; at Cypress in 1856 or 1857; at Thompsons, I do not know. They were put in after the road was completed to Millican, possibly as late as 1870. At Eureka and Gum Island, I do not know, but it was previous to 1866. At some of the points, notably at Hempstead and Cypress, the side tracks were changed after they were first put in and additions made; but I cannot tell to what extent or at what places other than those mentioned.

X 11.

I do not know how many miles of sidings there are in Houston at this time. There may be ten or a dozen miles. I have no idea how many there were in December, 1869, nor how many miles were built between December, 1869, and December, 1873. I do not know that any were built in that time. I have no maps or other data showing what sidings they have and their length, and I do not now remember for what length of sidings the company received land certificates. It is a fact that I reside in Houston and have resided there for a quarter of a century, but I could not tell the length of the streets nor how many there were in the city, and with a few exceptions could not tell their names without referring to a map. I seldom see the sidings except at street-car crossing- or along the main track in the upper main part of town as I pass on the cars. I could not from my own knowledge tell the side tracks of the H. & T. C. from those of other roads running alongside of them. I am not a professional engineer nor an expert, and could not tell by walking over the road or the sidings how many there are, 111 and if I had the physical ability to walk over the road without great fatigue, as requested, it would not be practicable to give a reliable guess at the length of sidings. I resided in Houston in December, 1869, and 1873, but I do not remember what side tracks the H. & T. C. railway had. If I have "drawn largely from my general knowledge" in answering other interrogatories, it was with regard to matters in the line of my profession. This is not.

X 12.

As a matter of fact, the Houston and Texas Central Railway Company never declared what act or acts it claimed under, and no one was authorized to say under what particular act it claimed, as far as I know and believe.

X 13.

I have ne-r — any letter from Governor Houston to Hotchkiss, and there is no report accompanying the interrogatories, so it is impossible for me to examine them.

Deposition of W. L. McGaughey.

My name is W. L. McGaughey, and residence Austin, Travis county, Texas. I hold the position of commissioner of the general land office of the State of Texas.

There is evidence in this office that certificates which call for sidings and turnouts have been issued to the following railroads in Texas, to wit: The Buffalo Bayou, Brazos & Colorado; Columbus Tap, Denison & Southeastern, East Line and Red River, Galveston, Houston & Henderson; Galveston, Brazos & Colorado Narrow Gauge; Georgetown, Gulf, Colorado & Santa Fé; Galveston, Harrisburg & San Antonio; Gulf, West Texas & Pacific; Houston, East & West Texas; Houston & Great Northern, Houston & Texas Central, Indianola, Longview & Sabine Valley, Southern Pacific, San Antonio & Mexican Gulf, Texas Western Narrow Gauge,
112 Texas & Pacific, Texas & New Orleans, Waco and North-western, and Washington County.

On account of the absence of engineers' reports it cannot be determined what number of miles of sidings and turnouts certificates were issued for on some of the railway or parts of railways. In other words, during the time the certificates were issued by the commissioner of claims, owing to the absence of the proper reports, the faces of the certificates in very nearly all cases are the only means of determining the question; and I must say that the face of a certificate is not a reliable guide, because there are many instances of record in this office where sidings are not expressed in the face of the certificates, notwithstanding a fractional part of the certificates is based on sidings or turnouts. Therefore I am unable to state the names of all the governors and under whose administrations certificates for sidings and turnouts were issued to railroad companies. Among the governors under whose administrations certificates for sidings and turnouts were issued are Edw'd Clark, F. R. Lubbock, Pendleton Murrah, A. J. Hamilton, Jas. W. Throckmorton, E. M. Pease, E. J. Davis, Richard Coke, and R. B. Hubbard. For the reasons above stated, I cannot give the names of all the land commissioners under whose administrations land certificates for sidings and turnouts were issued, but among those who did issue certificates for sidings and turnouts are W. S. Hotchkiss (commissioner of claims), Francis M. White, Stephen Crosby, Joseph S. Spence, Jacob Keuchler, J. J. Gross, and W. C. Walsh. The evidence and authority under which such land commissioners acted (except the missing reports before mentioned and except in a few other instances) are on file in this office, the same being the certificates of the governors and certified copies of the engineers' reports upon which the governors' certificates were based. Where sidings

were expressed in the land certificates in most cases the number
113 of miles of main track and the number of miles of sidings are stated.

Answers to Cross-interrogatories.

I do not know how said companies construed the laws, but it is a fact that they did not get any certificates for sidings upon the first hundred miles of their road at the time the certificates upon main track were issued. No sidings were reported for the 1st, 2nd, and 3rd sections, but on the 4th sections sidings were reported and certificates for same were not issued. I cannot state the particular places where siding are located, for the reason the engineer report on that section of the road is not on file in this office. The State engineer's report dated January 5th, 1857, states at the first section of 25 miles of the H. & T. C. R'y was finished and in running order on the 27th day of July, 1856. The first certificates were issued March 5th, 1857. I do not know of any record showing that either Governor Runnels or Governor Houston ever reproved certificates for sidings. If the letter dated March 30th, 1860, from Governor Houston to W. S. Hotchkiss in regard to 38 miles of railway of the B. B., B. & C. R. R. is the letter referred to, I do not find anything in it in regard to sidings. The engineer's report on which the letter is based is not on file in this office.

Deposition of C. C. Gibbs.

Defendants read in evidence deposition of C. C. Gibbs.

Answers of C. C. Gibbs.

I represent some of the owners of the land formerly belonging to the Houston and Texas Central Railway Company. I have the custody of the records and archives of all the land originally granted to the Houston and Texas Central Railway Company; they came into my possession through the owners, their agents, 114 and the receiver of the Houston and Texas Central Railway Company.

(a.) There were 1,540 certificates issued on that portion of the road from Brenham to Austin, numbered from 3497 to 5036.

(b.) These certificates were all located in the counties designated in the statement attached and marked by me Exhibit "A" for identification.

(c.) All of said certificates were located, which amounted to nine eighty-five six hundred acres of land.

The amount of taxes paid by the Houston and Texas Central Railway Company, the receiver thereof, and the owners I represent on the lands located by virtue of this issue of certificates will approximate \$113,117. The records here are not in all respects complete and I can but approximate this amount. More exact information upon this subject can be had from the comptroller's office. The state departments have abstracted these certificates and surveys. I know by the published official abstracts of land titles. The State and county officials have never refused to accept taxes on these

lands. The money was paid to the officers authorized to receive it and I presume was applied as the law directs. I am unable to state the cost of locating, surveying, and plotting all the field-notes of surveys made by virtue of these certificates. The contract price for locating certificates at the time these were located was from \$20 to \$25 per certificate. This was reasonable, and the work I consider was worth that amount. The patent fees were \$5 for survey of 320 acres or less and \$6 for surveys for more than 320 acres up to and including 640 acres. Of this issue of certificates there are twenty surveys of the \$5 class and 1,424 of \$6 class patented, which would amount to \$8,644 patent fees paid.

115 I have not stated that certificates were issued to the Houston and Texas Central Railway Company prior to the construction of the Western branch from Brenham to Austin.

The certificates were issued to said company under its charter and the general and special laws of the State of Texas.

Deposition of Geo. W. Polk.

GEO. W. POLK.

Defendants introduced the deposition of George W. Polk, which is as follows:

He was chief clerk in the land office of the Houston and Texas Central Railway Company.

To the second interrogatory he answered that Mr. C. C. Gibbs was the land commissioner of the company; had the custody of the records and archives of the company, and he was chief clerk in his office.

To the third interrogatory he stated that there were issued to the Houston and Texas Central Railway Company on that portion of its road from Austin to Brenham 1,540 certificates of 640 acres each. The certificates were located in the following counties, viz: Taylor, Crockett, Nolan, Tom Green, Jeff Davis, Pecos, and Mitchell; that there were 985,640 acres located by virtue of such certificates.

He also stated, in answer to the 8th interrogatory, that the land department of the State made an abstract of all the surveys named above.

In answer to the 9th interrogatory he stated that the State had never refused to take any taxes on the land.

U. S. Court Order Discharging Easton & Rintoul as Joint Receivers.

Defendants introduced the following certified copy of order made in consolidated cause No. 198, Nelson S. Easton *et al.* vs. The Houston and Texas Central Railway Company *et al.*, pending in the United States circuit court for the eastern district of Texas, at Galveston, which is as follows:

116 "This cause came on to be heard at this term on the application of Frederick P. Oleott *et al.* to relieve Nelson S. Easton and James Rintoul from further duty as receivers herein

and for other purposes, and was argued by counsel. Whereupon and on consideration whereof it is ordered, adjudged, and decreed that Nelson S. Easton and James Rintoul, two of the joint receivers herein, be, and the same are hereby, relieved from any further duty as joint receivers in this cause, and the said Easton and Rintoul do pass their accounts to date before John G. Winter, special master in chancery herein. It is further ordered, adjudged, and decreed that Charles Dillingham, the other of the joint receivers hereinbefore appointed, be, and he is hereby, continued as sole receiver in this cause, with all the powers, rights, duties, and obligations now resident in him as joint receiver and heretofore established by the order herein entered appointing him and said Nelson S. Easton and James Rintoul joint receivers. It is further ordered, adjudged, and decreed that all rights, claims, and demands arising against the said joint receivers during their administration shall be prosecuted against the said Charles Dillingham alone, and that the said Charles Dillingham shall alone have the right to prosecute and defend all rights, claims, and demands of every kind and nature arising in behalf of or against the said joint receivers or in behalf of or against the *said joint receivers or in behalf of or against the* Houston and Texas Central Railway Company and to prosecute or defend any right, claim, or demand or action at law or in equity which the said joint receivers might have prosecuted or defended under the order of this court. It is further ordered, adjudged, and decreed that the said Charles Dillingham during his sole receivership herein and until the property in his possession shall be delivered to the respective purchasers, Frederick P.

Olcott and George W. Downs, shall have power and
117 authority to collect for account of the parties in interest the land notes in his possession as sole receiver, and on payment to him of said notes to execute release of the mortgage securing said notes on the land sold, and he shall further have the power to make sale of and deeds for the lands in his possession heretofore sold to said purchasers, Olcott and Downs, with the direction, however, to report all such sales before deeds are given to the said Frederick P. Olcott of the lands bought by him and to George E. Downs and the Farmers' Loan and Trust Company, trustee, of the land bought by said George E. Downs, with the right in said Frederick P. Olcott respectively to prevent any such sales by timely objection thereto, it being especially understood that no sales of lands bought by said Downs and covered by the mortgage to the Farmers' Loan and Trust Company, as trustee of the first mortgage of the Waco Northwestern division, shall be made free of said mortgage except by and with the consent and deed of said Farmers' Loan and Trust Company, trustee, as aforesaid."

Defendants introduced the following :

U. S. Court Order Restraining Receiver.

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,

vs.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*,
Appellees.

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 118 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings as herein directed pending the hearing and decision of the said appeals:

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the said appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the receiver of the Houston and Texas Central Railway Company, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central railway or any of the line of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them, to apply to me to vacate the said stay, if the said appellants fail to prosecute the said appeals with due diligence.

Dated Washington, December 9th, 1892.

L. Q. C. LAMAR,
*Associate Justice of the Supreme Court of the
United States, Assigned to the 5th Circuit.*

Deposition of J. C. Kidd.

Defendants offer the deposition of J. C. Kidd, which is as follows :

Witness answered to the first interrogatory that he was in the employment of the receiver of the Houston and Texas Central Railway Company in the capacity of assistant auditor.

Second. The books, minutes, &c., of the Houston and Texas Central Railway Company have been in the custody of the 119 secretary. At present, owing to the death of Mr. H. Hall, secretary, the said books are in the custody of the witness.

Third. Resolution passed under the provision of the law entitled

"An act for the relief of railway companies, &c.," passed in 1862, restoring the original *bona fide* stockholders of said company, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled *provides* to and of which they were divested by the sale of the road to W. J. Hutchins and others, passed November 5, 1862, is as follows:

Resolution of Directors of Railway.

Copy of resolution.

Whereas the legislature of the State of Texas — "An act for the relief of certain railway companies," approved January 11, 1862, and "An act for the relief of companies incorporated for purposes of internal improvements by allowing the further time for performance on account of the war," also approved January 11, 1862, which required the assent of the Houston and Texas Central Railway Company to their provisions before the benefit thereof will inure to said company; therefore

Be it resolved by the president and board of directors of said company, That it does consent to and adopt the provisions of said acts, in so far as they expressly apply to said company, "restoring the original *bona fide* stockholders of said company—those who have paid for stock—to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others," and subject to the proviso contained in said acts, to wit: "That if the said original *bona fide* stockholders should fail to pay into the treasury of said company 10% upon their said stock on or before the expiration of the extension of time provided in this act for railway companies to fulfill their charter obligations to the State, 120 then and in that case said stockholders shall forfeit all their rights, privileges, and property interest as stockholders in said road.

Given under my hand and seal—using scroll for seal, the company having no seal—at Houston, this Nov. 25th, 1862.

(Signed)

JAMES F. LOUDON, *Secretary.*

The above and foregoing is a true and correct copy of the resolution as it appears on the minutes of the Houston and Texas Central Railway Company, pages 30 and 31.

(Signed)

J. C. KIDD.

Deposition of J. C. Kidd Continued.

Witness answers that so far as he was aware all the stock that was reinstated in compliance with the terms of the resolution has been treated as valid, and all the holders of same so desiring voted at subsequent meetings, so far as he is aware, and he makes this answer from an examination of the minutes of the company.

Witness further stated that he was not aware that the railway or

any of its directors denied or in any way attempted to deny to stockholders any of their rights under the law restoring them, but, from an examination of the minutes of the company, judges that they were fully recognized in all their rights. His opportunities for knowing is an examination of the minutes and stock book of the company.

Witness stated, in answer to the first cross-interrogatory, that James F. Loudon, secretary, is dead, and that he judges the resolution to be his handwriting. The book is in his custody. Witness further stated that he had been in the employ of the Houston and Texas Central Railway Company, and subsequently of its receiver, in the accounting department since April 6, 1876, in the capacity of chief freight clerk, chief accountant, and assistant auditor.

121 From April, 1870, to 1876, was directly connected with the road.

In answer to the 5th cross-interrogatory, witness stated that he had not been able to find on file at this time any acknowledgment of the receiver by the governor of the resolution, nor in letter book showing a copy of any letter or communication by the company or its agents to the governor that such resolution had been forwarded to him.

Evidence of Completion of Railroad.

Defendants introduced evidence showing completion of road to Richland creek September 26th, 1871, and to Bryan August 27th, 1867.

Agreement as to Special Laws, Charters, etc.

It is further understood and hereby agreed by and between the parties that any and all of the charters of the said railway company and any and all the general and special laws pertaining to grants of lands to railway companies may be referred to and read to the appellate court without being transcribed at length herein. This also embraces extracts from house and senate journal of the State legislature.

Letter from Gov. Davis to Com. Keuchler.

Defendants introduced in evidence a certified copy of a letter from Gov. Davis as follows:

GOVERNOR'S OFFICE, AUSTIN, July 19th, 1872.

SIR: I have not heretofore had time to reply to your communication of 6th inst. in regard to the issue of land certificates to the two branches of the H. & T. C. R. R.

I am of the opinion that the decision of the supreme court in the H. & G. N. R. R. case covers substantially the abstract right 122 of the former railway, and I am not prepared to say that this company should be required to commence suit to enforce that right.

At the same time, I am inclined to believe that the company can only legally charge U. S. currency for freight and passage.

That we should withhold from them, however, what is legally theirs, so as to compel them to originate a suit which should properly be initiated by the State to enforce a forfeiture, is a further question, touching which I am, to say the least, in grave doubt.

Very respectfully, EDMOND J. DAVIS, *Governor.*

Hon. Jacob Keuchler, commissioner general land office, Austin Texas.

Defendants rested their case.

Deposition of Geo. W. Smith.

Plaintiff introduced the answer of Geo. W. Smith, secretary of state, in reply to a question asked by defendants if a certain resolution of the Houston and Texas Central Railway Company restoring certain stockholders to their original rights, as provided by section 4 of the act entitled "An act for the relief of railway companies," could be found by an examination of the records of his office and whether or not the same was now on file therein; to which he replied that no such resolution had been found among the records and archives of his office, and that he had caused repeated and diligent searches to be made for the resolution.

Deposition of W. L. McGaughey.

The plaintiff offered in evidence the answer of W. L. McGaughey to cross-interrogatory No. 2 of the deposition taken on the 5th day of September, 1892, which is as follows:

Second cross-interrogatory. "It is not true that on July 1, 1872, the defendant company received its first certificates for sidings (from certificates 27/1601 to 34/3596) 110.78 miles of main track and 7.72 miles of sidings, in all 118.5, to Corsicana? If you say that such fact is shown by the records of the land office, then please state what sidings—that is, sidings at what place—are included in the above issue of certificates from No. 27/1601 to 34/3496. Please make a careful examination and obtain these facts from the records." To which interrogatory the witness answers, "Yes; I can not state the particular places where sidings are located, for the reason that the engineer's report on that section of the road is not on file in this office."

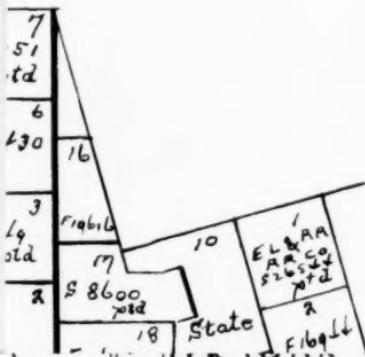
Deposition of Gov. Lubbock.

Plaintiff then offered the answer of Governor Lubbock, who was governor of Texas in 1862-'63, to the effect that he has no recollection whatever of ever receiving such a resolution as that mentioned in the act of January 11, 1862, known as an act for the relief of railroad companies.

15040

U. S. F. & M.

: 4.



March 4th 1840.

I do hereby
from the maps

my hand
affixed the day

Fall.
Commissioner.

FLEE

File Made by R. M. Elgin Again Introduced.

Plaintiff again introduced the file made by R. M. Elgin, land agent of the Houston and Texas Central Railway Company, and filed on the 28th day of July, 1872. The file is copied in full in the previous part of this statement of facts.

124 *Certificate of Commissioner of Land Office.*

Plaintiff then offered in evidence the certificates of the commissioner of the land office that the certificates named in this suit, which by number show that they are the certificates in the suit located in Nolan county, issued to the Houston and Texas Central Railway Company.

It is agreed by and between the parties that the foregoing contains all the material evidence and facts introduced on the trial of the above stated cause.

C. A. CULBERSON,
Attorney General, and
FRANK ANDREWS, *Att'y,*
For the State of Texas.
T. D. COBBS,
Attorney for Defendants.

The court, having examined the foregoing agreed statement of facts, hereby, in all respects, approved the same.

WM. KENNEDY,
Judge 32nd Judicial District.

Endorsed as follows, to wit:

Agreed statement of facts. Filed May 1st, 1893. John C. Cox, clerk district court, Nolan county, Texas.

(The map next following appears at a similar position in the transcript in the court of civil appeals. W. L. Huff, clerk.)

(Here follows map marked p. 125.)

126 *Appeal Bond.*

Filed May 8, 1893.

THE STATE OF TEXAS
vs.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, }
FREDERICK P. OLcott, and GEORGE E. DOWNS. } No. 269.

Whereas in a proceeding had in the district court of Nolan county, Texas, cause No. 269, in which the State of Texas brought suit in trespass to try title and for the recovery of certain lands hereinafter

described, as plaintiff, against The Houston and Texas Central Railway Company, Frederick P. Olcott, and George E. Downs, as defendants; and whereas said cause coming on to be heard before the court at the April term, A. D. 1893, of said court; and whereas on the 19th day of April, 1893, the court, having taken the same under advisement, heretofore pronounced a judgment in favor of the plaintiff on said day for the land sued for; which said judgment so pronounced by the said court is as follows, to wit:

THE STATE OF TEXAS

vs.

HOUSTON & TEXAS CENTRAL RAILWAY
Company, Frederick P. Olcott, and
Geo. E. Downs.

No. 269. April 19th, 1893.

Judgment of Court.

On this the 19th day of April, 1893, this cause came on to be heard and the plaintiff, The State of Texas, appearing by her att'y general, C. A. Culberson, and the defendants appearing by attorney, when came on to be heard the plea of the defendant- to the jurisdiction of this court and the plea of defendant-, and the same, having been submitted and being duly considered, was overruled by the court; to which ruling defendant- except that there was a want of necessary parties, and that Chas. Dillingham, as receiver of The H. & T. C. R'y Co., defendant, was a necessary party to this suit, and praying that the court abate this suit, and said plea, being duly considered by the court, is in all things overruled; to which judgment the defendant excepts. Then came on to be heard the defendants' exceptions to plaintiff's original petition No. 1, 2, 3, and 4. The same being duly considered by the court, same are each in all things overruled; to which judgment the defendants excepts; whereupon came on to be heard the disclaimer herein filed by George E. Downs, one of the defendants in this suit, disclaiming title or right or possession to any of the lands sued for, and the court, after considering same, is of opinion that said Geo. E. Downs should go hence without day and recover his cost in this behalf expended, and — is so ordered. Then this cause being called for trial *was* on its merits, all parties, both plaintiff and defendant-, having announced ready, when came said parties, by their attorneys, and submitted the matters in controversy, as well as of facts — of law, to the court; and the pleadings, evidence, and argument of counsel for all parties having been fully heard and understood by the court, it is the opinion of the court that the plaintiff, The State of Texas, should recover judgment. It is therefore ordered, adjudged, and decreed by the court that The State of Texas, plaintiff, do have and recover of the defendants The Houston and Texas Central Railway Company and Frederick P. Olcott the lands, to wit:

Sixteen sections of lands of 640 acres each, situated and lying in Nolan county, Texas, in that certain block of Houston & Texas Central Railway surveys known as block No. 64, all of which are more particularly described and designated by the following tabulated statement showing block, survey and certificate number, and number of acres and where located, to wit:

128

No. certifi- cate.	Date of cer- tificate.	To whom issued.	Survey No.	No. block.	No. acres.	In what county located.
38/4438	July 1st, 1872	H. & T. C. R'y Co.	169	64	640	Nolan.
38/4443	"	" "	191	"	640	"
40/4997	"	" "	199	"	640	"
40/4998	"	" "	201	"	640	"
40/4999	"	" "	203	"	640	"
40/5001	"	" "	207	"	640	"
40/5002	"	" "	209	"	640	"
40/5003	"	" "	211	"	640	"
40/5004	"	" "	213	"	640	"
40/5005	"	" "	215	"	640	"
40/5006	"	" "	217	"	640	"
40/5019	"	" "	243	"	640	"
40/5020	"	" "	245	"	640	"
40/5021	"	" "	247	"	640	"
40/5022	"	" "	249	"	640	"
40/5023	"	" "	251	"	640	"

It is further ordered, adjudged, and decreed by the court that said plaintiff, The State of Texas, do recover of said defendants the possession of said land hereinbefore described, and that the said certificates upon and by virtue of which said lands were located by said defendant railway company as hereinbefore described are wholly void, and that same are hereby cancelled and held for naught, and that the clouds cast upon the title of plaintiff to aforesaid lands by the location and survey of said certificates is hereby removed, and that plaintiff recover of said defendants, jointly and severally, all cost in this behalf expended; to which judgment the defendants except.

THE STATE OF TEXAS

vs.

THE HOUSTON & TEXAS CENTRAL R'Y CO., FRED. P. OL- }
COTT, *et al.* } No. 269.

APRIL 19TH, 1893.

On this the 19th day of April, 1893, came on to be heard defendants' motion to set aside the decree of the court rendered in this cause on this date, and to grant to defendants a new trial.

129 Both parties appearing by attorneys and the court, having heard and considered said motion, as well as argument of counsel, is of opinion that the law is against said motion. It is therefore ordered, adjudged, and decreed by the court that the said motion be, and the same is hereby, in all things overruled; to which ruling of the court the defendants except and give notice of appeal in open court to the court of civil appeals, 2nd supreme district of Texas, and the parties in this cause are given ten days after adjournment of this court in which to file their statement of facts.

From which judgment in favor of the State of Texas the said Houston and Texas Central Railway Company and Frederick P.

Olcott have taken an appeal to the court of civil appeals of the State of Texas for the second supreme judicial district in the city of Ft. Worth, in the county of Tarrant; and whereas the clerk of said court has fixed the probable amount of costs of the court of civil appeals, supreme court, and the court below at the sum of five hundred (\$500) dollars:

Now, therefore, we, the Houston and Texas Central Railway Company and F. P. Olcott, as principals, Wm. D. Cleveland and C. Lombardi, as sureties, acknowledge ourselves bound to pay the State of Texas the sum of one thousand (\$1,000) dollars, the same being double the probable amount of costs of said courts so fixed by the said clerk, conditioned that said Houston and Texas Central Railway Company and said Frederick P. Olcott, appellants, shall prosecute their appeal with effect and shall pay all the costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court.

Witness our hands this the 28th day of April, A. D. 1893.

HOUSTON AND TEXAS CENTRAL
RAILWAY COMPANY AND
F. P. OLCOOTT,
By T. D. COBBS, *Att'y.*
WM. D. CLEVELAND.
C. LOMBARDI.

130 Approved:

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

THE STATE OF TEXAS, }
County of Harris. }

I, J. R. Warters, clerk of the district court in and for said county, do hereby certify that Wm. D. Cleveland and C. Lombardy, whose names appear signed to the annexed bond, are in my opinion good and ample security for the amount therein specified; that they have property in said county subject to execution of a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

Witness my hand and seal of office, at Houston, Texas, this 28th day of April, 1893.

J. R. WARTERS,
Clerk District Court, Harris County.

I fix the amount of probable — at \$500.00.

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

Endorsed as follows, to wit:
Appeal bond. Filed May 8, 1893.

131

Assignment of Errors.

Filed May 8, 1893.

THE STATE OF TEXAS

vs.

THE HOUSTON AND TEXAS CENTRAL
RAILWAY COMPANY *et al.*No. 269. Pending in the
District Court of Nolan
County, Texas.

And now come the defendants and make the following assignment of errors, to wit:

I.

The court erred in overruling defendants' plea to the jurisdiction of said court to try said cause, because it was shown that all of the property of the Houston and Texas Central Railway Company, including the lands sued for, were in the hands of Charles Dillingham as receiver thereof, appointed under orders and decrees of the United States circuit court in consolidated cause No. 198, Nelson S. Easton *et al.*, trustee, *vs.* The Houston and Texas Central Railway Company *et al.*, pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that this said cause was instituted without permission of said United States circuit court or any of the judges thereof.

II.

The court erred in overruling defendants' plea that there was a want of necessary parties to the suit, because it was shown that Charles Dillingham was receiver and in possession of the property sued for prior to the institution of said suit by virtue of an appointment made in consolidated cause No. 198, Nelson S. Easton *et al.* *vs.* The Houston and Texas Central Railway Company *et al.*, pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of such appointment was in possession of said property under the orders and decrees of said United States circuit court, and so being in the possession of said property at the institution of said suit and at the final trial of said cause was therefore a necessary party to the suit.

III.

The court erred in overruling defendants' first exception, the same being the general exception and calls into question the sufficiency of the petition and raises the question as to whether or not the allegations of same would entitle the plaintiff to recover at all, and especially upon any of the allegations upon which the suit was instituted.

IV.

The court erred in overruling paragraph 4 of defendants' exceptions, because said petition failed to affirmatively allege and show that the att'y general of the State of Texas was authorized to insti-

tute the suit, and had authority to do so, either under the law of the State or was properly directed to do so by the State of Texas; and the court therefore erred in overruling the exception, to the extent that the plaintiff was not required to specially state in the face of the petition what, if any, authority the att'y general had for the institution of the suit; and the court erred in not requiring the att'y general, upon the demand of the defendants, to allege or show what the authority was, whether written or verbal, general or special.

V.

The court erred in not finding as a matter of fact that the lands sued for, although embraced in what is generally known as the Texas & Pacific reservation, that prior to the passage of said act that the same were not affected by the said Pacific reservation, because on the 28th day of July, 1872, the Houston & Texas Central Railway Company made a valid file through the proper surveyor's district, which file was in force and effect prior to the creation of said reservation, and that the lands sued for by plaintiff were by the said railway company surveyed within the said file and within twelve months after the same had been made.

VI.

The court erred in its first conclusion of law in holding that the suit was brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, the said railway company and Olcott, and that the same could be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal court, and that the suit was brought without the permission of the Federal court; and the court erred in this: that the suit being to recover the title of property, which property was in the hands of the receiver, and suit therefore against the corporation, which is in the hands of a receiver, with the property in possession of said receiver by reason of his appointment as such, is therefore a suit against the receiver, which could not be brought without the permission of the court in which the receivership was pending, the same not being in respect to any act or transaction of his in carrying on the business connected with such property.

VII.

The court erred in not holding that the law of January 11, 1862, and its acceptance by the Houston & Texas Central Railway Company by the resolution passed by its board of directors November 5, 1862, restoring the stockholders to their original positions in the company, was a contract by and between the State of Texas and the Houston & Texas Central Railway Company which entitled said railway company to all the rights and benefits of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made

therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation of section 10, article 1, of said Constitution of the United States, and the constitution of the State of Texas.

VIII.

The court erred in holding that the special act of January 23, 1856, authorized the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway Company.

IX.

The court erred in holding that the special act approved February 4, 1858, in so far as the same could be held to grant lands to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation.

X.

The court erred in holding that the war between the States closed in Texas on the 28th day of May, 1865, when in truth and in fact the war closed in Texas August 20, 1866, as determined both by the supreme court of Texas in *Grigsby vs. Peake*, 54 Texas, page 149, and Supreme Court of the United States in *Freeborne vs. The Protector*, 12 Wallace, 702, and that the court's conclusion was also erroneous as to when the said act of January 30, 1854, expired and ceased to be in force and effect.

XI.

The court erred in holding that the act approved November 13, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and that the same was null and void, because the said law was valid and has been so held to be both by the decisions of the supreme court of Texas and the Supreme Court of the United States, and was a lawful and valid act.

XII.

The court erred in holding that the Houston & Texas Central Railway Company could not claim lands under the special act of September 21, 1866, granting sixteen sections of land to the mile of completed track, for the reason, as found by the court, that it failed to comply with the provisions of that act, and that it should build fifty miles of road within two years from January 1, 1867, and seventy-five miles within three years from that date, and for that reason the company had lost the right to earn lands under that act, when in truth and in fact the railway company had not forfeited any right to earn lands and did earn the land within the time prescribed by law, and if the said railway company failed to build the fifty miles

within two years from January 1st, 1867, the said railway company was relieved of said failure to complete its road for the reason that the State of Texas waived all claims to the lands by extending the time, and for the further reason that the said State of Texas never undertook to assert any forfeiture, and that the completion of said railway within the stated period was not a condition precedent.

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XIII.

The court erred in inquiring into and holding that the said railway company or any part of it was not completed within the time and manner required by law, for this, that the executive of the State of Texas was under the law charged with that duty, and, having passed upon the same and certificates having been issued to the said railway company in pursuance of such findings of the governor, his acts were final and conclusive, and this court has no authority whatever in law to go beyond the action of the executive, whose duty it was to pass upon these questions, and his action in the premises was final.

XIV.

The court erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, which repealed the act of September 30, 1854, was in conflict with that constitution and therefore null and void, for this, that the constitution of 1869 did not relate to nor affect the rights of the Houston and Texas Central Railway Company to earn lands. The said constitution of 1869 by its very terms did not undertake to impair any existing right to earn lands, but, on the contrary, the same preserved the prior and existing rights, and therefore, the Houston and Texas Central Railway Company having at the adoption of the constitution of 1869 a prior existing right, the law of August 16, 1870, was not in conflict with the constitution of 1869 and was a valid law, and all rights of the Houston and Texas Central Railway Company were protected under said law of 1870, and also by reason of the provisions of the constitution of 1869, and the same were continued in force and effect.

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XV.

The court erred in holding that the defendant F. P. Olcott, having taken title under the certificates, was affected with notice of their invalidity under the constitution of 1869, in this, that the said F. P. Olcott was the purchaser of said land under and by virtue of the foreclosure of mortgages, which had been executed by the railway company under legislative sanction ; that the Houston and Texas Central Railway Company was a corporation duly organized under the laws of the State of Texas prior to the act of January 30, 1854. There was nothing in the face of the certificate nor elsewhere to put the said Olcott upon any notice whatever that there was any defect in his title ; but, on the contrary, the action of the State of Texas and her officers in permitting said lands to be surveyed and

recognized in the land office as the lands of the railway company, to be mapped and platted therein as lands of the railway company, taxes paid and received on the same as lands of the railway company, and patenting other lands by virtue of same series and issue of certificates was such as to lead the said Olcott to believe that the State of Texas, if it had any claim, had waived the same.

XVI.

The court erred in holding that *under* the special act entitled "An act granting lands to the Houston and Texas Central Railway Company," approved September 21, 1866, superseded the act of January 30, 1854, and no portion of such railway had the right to a land grant from the State, and after the passage of said special acts said company could only acquire lands from the State under the provisions thereof. There was nothing in either the said act of September 21, 1866, or the said act of November 13, 1866, which denied to the Houston and Texas Central Railway Company
138 any of the rights, privileges, and grants which are made in said latter act.

XVII.

The court erred in not holding under the law of January 30, 1854, and the several amendments and supplements thereto, and the said act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866, and the provisions of the constitution of 1869, and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of the statutes of limitation until March 30, 1870, extended the operation of the act of January 30, 1854, irrespective of either of the law of September 21, 1866, or of November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinance of said convention as to setting the operation of the laws of statutes of limitation gave the Houston and Texas Central Railway Company all the rights, benefits, and grants preserved by said act of January 30, 1854, including the right to grants of land for necessary sidings and turnouts until March 30, 1870.

XVIII.

The court erred in going behind the certificates issued to the Houston and Texas Central Railway Company for the purpose of inquiring into the time when the road was completed to certain stated points, because the governor, who appointed the engineer to inspect the road when completed and to report upon the same, was by the law constituted the sole and final judge of whether or not the necessary antecedent acts had been done and performed, and the decision that the railway company had done and performed the conditions precedent to its right to acquire lands, as evidenced by the certificates of the land commissioner and the patents
139 issued thereupon, are conclusive and final, and there being no allegations in said petition which would authorize the court

to review the act and the conclusion of the constituted officers under the provisions of the law.

XIX.

The court erred in not holding that if there was doubt under the law as to whether or not the said railway company was entitled to said lands that the construction placed upon said law by the executive departments would be conclusive and binding and ought not to be disturbed, and by reason of such executive construction that the said railway company was entitled to the said land; that the same became a rule of property as to land granted and ought not now to be disturbed.

XX.

The following uncontested facts being in evidence, to wit, that all lands granted to said railway company were duly surveyed and returned, as the law required; field-notes returned to the general land office; maps, plats, and sketches duly made and used as archives in the land office and in the counties in which the lands are situated upon which was endorsed, "The lands of the Houston and Texas Central Railway Company," and so recognized as its lands; the executive construction placed upon the same; that the same were by legislative permission and authority mortgaged for the purpose of construction; taxes regularly paid thereon; finally foreclosed and purchased by F. P. Olcott, it was therefore error in not holding by reason of such facts that the State was estopped by her own laches from setting up any claim whatever for the lands sued for, and that the same is a stale demand, and that said facts and said acquiescence on the part of the State and her laches
140 for so long a time constituted a waiver upon the part of the State to any claim, if any she had, in and to such land.

XXI.

The court erred in not holding that by reason of the charter to said railway company and the several acts amendatory thereto and supplements thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision in the case of *Railway vs. Commissioner*, 36 Texas, 383; *Davis vs. Gray*, 16 Wallace, 203; *G. H. & S. A. Ry vs. State*, 81 Texas, 573, and the executive construction as to the right to acquire lands for the period of thirty years—executive, judicial, and legislative construction placed upon said charters and laws of this State established a rule of property, how a property right of defendant and their deprivation of said property through a new rule and through a new construction of said laws would be the taking of their property without due process of law and constitutes the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through the charter and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly 10th section of the first article and the 14th article of amendments thereof.

XXII.

The court erred, upon the motion of the State of Texas, in striking out the answers of C. C. Gibbs to interrogatories 4, 5, and 6 and exhibits thereto, as shown by bill of exceptions No. (1) one, because the said testimony was offered under the allegations of its answer, not excepted to, for the purpose of showing that the defendant com-

pany had lost, by reason of adverse location and by reason of
141 the Pacific reservation, more lands than it had received from
the State of Texas under and by virtue of the same issued
for sidings, in case the court should hold that the said railway com-
pany was not entitled to certificates for sidings upon that part of
the road for which certificates involved in this suit were issued;
and the court also erred in striking out the answers of George W.
Polk, a witness for defendants, to the same interrogatories, as appears
from bill of exceptions No. 2, offered for the same reason.

XXIII.

The court erred in overruling defendants' motion for a new trial upon the grounds set forth therein, the first ground being that the said suit was instituted against the property of the Houston and Texas Central Railway Company, which was then in the hands of a receiver appointed by the United States circuit court, who was in possession of the property, and that the plaintiff brought the suit in violation of the comity existing between courts of concurrent jurisdiction without asking the permission of the said court where the receivership was pending to sue for the property, which was by law in the possession of the receiver, the second ground being that the evidence showed upon the plea of defendants that Charles Dillingham was receiver of all the property of the Houston and Texas Central Railway Company, and was in possession of the land sued for by virtue of such orders and decrees, and that the law requires suits to be brought against parties in possession and claiming the property. The other grounds referred to in the motion for a new trial are fully set forth more specifically in the foregoing assignments.

All of which assignments of error are respectfully submitted.

T. D. COBBS,
Attorney for Defendants.

142 Endorsed as follows, to wit:

Assignment of errors. Filed May 8th, 1893. John C. Cox,
clerk of the district court, Nolan county, Texas.

Bill of Costs.

THE STATE OF TEXAS:

THE STATE OF TEXAS, Plaintiff,
vs.
HOUSTON & TEXAS CENTRAL R'Y Co., Defendant. } No. 269.

M., — to officers of court, Dr.

Clerk's Fees.

Sheriff's Fees.

R. E. White, Travis Co.	1 10
Jury tax, J. F. Newman	50
 Total sheriff's	\$1 60

Total sheriff's \$1 60

Joseph B. Brannon, New York, serving defendants Olcott and Downs	25 00
Deposition fees	17 50
Clerk's fees, orig. cost	24 25
Transcript, 49,000 words	98 00

	\$166 35
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143 THE STATE OF TEXAS, {
County of Nolan. }

I, John C. Cox, clerk of the district court in and for said county and State, hereby certify the above to be a correct account of the costs chargeable to the defendants in above entitled and numbered suit up to this date.

Given under my hand and seal of office, at Sweetwater, this 21st day of July, A. D. 1893.

JOHN C. COX,
Clerk District Court, Nolan Co., Texas.

District Clerk's Certificate.

THE STATE OF TEXAS, }
 County of Nolan. }

I, John C. Cox, clerk of the district court in and for Nolan county, Texas, do hereby certify that the foregoing transcript, consisting of 154 pages, contains a true copy of all the proceedings had and done in the said district court in cause No. 269, The State of Texas *vs.* Houston and Texas Central Railway Company, Frederick P. Olcott, and Geo. E. Downs; an assignment of errors, and a true certified bill of costs.

Given under my official signature and seal of said district court this the 24th day of July, 1893.

[L. s.]

JOHN C. COX,
Clerk District Court, Nolan County, Texas.

144 *Indorsements on Transcript from District Court.*

The entire record from the district court of Nolan county is indorsed as follows:

No. 1525. Houston and Texas Central Railway Co. *et al.*, appellants, *vs.* The State of Texas, appellee. From Nolan county.

Applied for by T. D. Cobbs, attorney for def'ts, on the 18th day of May, A. D. 1893. Delivered to J. H. Beall, att'y, on letter of said T. D. Cobb, on the 24th day of July, A. D. 1893. J. C. Cox, clerk district court, Nolan county.

Filed in the court of civil appeals, at Fort Worth, the 26th day of July, A. D. 1893. W. L. Huff, clerk.

Order of Submission in Court of Civil Appeals.

H. & T. C. R'Y Co. *et al.* }
 vs. } 1525.
 THE STATE OF TEXAS. }

Nov. 28, 1894.

Submitted on briefs and argument of both parties.

Opinion of the Court of Civil Appeals.

HOUSTON & TEXAS CENTRAL RAILWAY Co. *et al.*, Ap- }
 pellants, }
 vs. } No. 1525.
 THE STATE OF TEXAS, Appellee. }

Opinion.

This appeal is from a judgment rendered April 19, 1893, in favor of the State of Texas, for sixteen sections of land in Nolan county,

145 the suit having been brought in the name of the State by the attorney general February 3, 1890. The trial was had without a jury, and the judgment rests upon concisely stated conclusions of facts, which we adopt.

Since the trial many of the important questions of law involved have been determined by our supreme court in the following recent cases: *H. & T. C. R'y v. State*, *Quinlan v. H. & T. C. R'y*, and *G. H. & S. A. R'y v. State*, all reported in 34 S. W. Rep., pages 734, 738, and 746. We need not discuss the questions so fully considered in these cases, but proceed at once to consider the additional or peculiar features of the case at bar.

The Washington County Railroad Company was chartered in 1856 to construct and operate a railroad from a point on the Galveston & Red River railway (the name of which was changed that year to the Houston & Texas Central) to Brenham, which it did, beginning at Hempstead. Of this line of road the Houston & Texas Central Railway Company afterwards became the owner by purchase under mortgage foreclosure, and by special act of the legislature passed August 15, 1870, the Washington County Railroad Company was merged in the Houston & Texas Central and the latter authorized to extend that road from Brenham to Austin, which it did between the date of the special act and the 25th day of December, 1871; in consideration of which extension land certificates were issued to it in 1872 and located on the lands in controversy in June, 1873, within what had then just become the Texas & Pacific reserve, as provided in a special act of May 2, 1873. In the preceding July, however, a sort of blanket file seems to have been made or attempted in behalf of the H. & T. C. Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificate to any particular section of land. Nothing further seems to

have been done in pursuance of this file till the locations 146 were made in June of the succeeding year. It was expressly provided in the face of these certificates that they were to be located only on "unreserved" public domain. No patents have ever issued.

The questions thus arising are: Were the certificates valid? If so, were the locations valid?

We are of opinion that the first, if not the second, question should be answered in the negative. The constitution of 1869 (art. 10, sec. 6) stood in the way of any grant of lands to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County railroad from Brenham to Austin, was passed. Whatever new power this act attempted to confer upon the Houston & Texas Central Company to acquire land by building the road to Austin was withheld by the clause of the constitution referred to. *G. H. & S. A. R'y v. State*, 34 S. W. Rep., 749.

Did the power exist independent of the act of 1870? The old Galveston & Red River Company (now the Houston & Texas Central) had the right under its charter (granted in 1848) not only to construct its main line, but also "simultaneously" therewith "a

branch towards the city of Austin," besides general branching privileges. In accepting the benefits of a supplementary special act for its relief it was required to yield "all general branching privileges except such as are expressly granted by the provisions of its charter to certain points." It is claimed that it thus acquired not only the right to build the road from Brenham to Austin, as one of its branches "to certain points," but also the right to have sixteen sections of land to the mile for so building it, under the general law on that subject as passed in 1854 and extended for ten years in 1866. But this general law expressly denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right "to receive any grant of land for any branch road." While the privilege of building a branch towards or to Austin may have been retained, the further right to acquire sixteen sections of land for every mile of such branch road was not. It follows, we think, that the certificates in question were issued without authority, and hence did not authorize the appropriation of any part of the public lands.

147 But should this conclusion prove erroneous we are still not prepared to hold that the second question would admit of any other than a negative answer, though we do not find it necessary at this time to so decide. *Jumbo Co. v. Bacon & Graves*, 79 Texas, 5.

The judgment is affirmed.

STEPHENS,
Associate Justice.

Filed May 9, 1896.

Judgment of Court of Civil Appeals.

H. & T. C. R'Y Co. } 1525. From Dist. Court, Nolan Co., May
vs. } 9, 1896. Opinion by Mr. Stephens, A. J.
THE STATE OF TEXAS. }

This cause came on to be heard on a transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, and so ordered, adjudged, and decreed, that the judgment of the court below be in all things affirmed; that the appellants The Houston & Texas Central Railway Co. and F. P. Olcott and their sureties, Wm. D. Cleveland and C. Lombardi, pay all costs in this behalf expended, and that this decision be certified below for observance.

148 *Motion for Rehearing.*

In the Court of Civil Appeals, Second Supreme Judicial District.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.*, }
Appellants, }
vs. } No. 1525.
THE STATE OF TEXAS, Appellee. }

Now comes the appellant in the above-styled cause, by its attorney, and moves the court to set aside the judgment rendered on the

9th day of May, 1896, in this cause affirming the judgment of the court below in the above-stated cause, and for grounds for a rehearing submit the following:

First.

The court erred in not considering and in effect overruling appellants' first assignment of error, to the effect that the court below erred in overruling the appellants' plea to the jurisdiction of the district court to try said cause, because it was shown that all the property of the Houston & Texas Central Railway Company, including the land sued for, was in the hands of Charles Dillingham, as receiver thereof, appointed under the orders and decrees of the United States circuit court in consolidated cause 198, entitled Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*, pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that said cause was instituted without permission of said United States circuit court or any of the judges thereof, because the said Charles Dillingham, as receiver of the properties of said railway company, was in possession of said property as receiver thereof and was so placed in possession by the order and decree of the said United States circuit court. The facts in the case and the findings of the court below showed that the said receiver was in possession of the land sued for as receiver of said United States circuit court.

149 Second.

The court erred in not passing upon and considering appellants' first and second assignments of error and in effect overruling the same, because the assignments raised the question of want of proper parties to the suit, it being shown that Charles Dillingham, receiver, was in possession of the property sued for prior to the institution of said suit by virtue of an appointment made in consolidated cause #198, entitled "Nelson S. Easton *et al.*, trustees, *vs.* The Houston and Texas Central Railway Company *et al.*," pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of which appointment his possession was extended to and included, under the order of said United States circuit court, the land sued for in this suit, and so being in the possession of said property at the institution of said suit and at the final trial of said cause, he was therefore a necessary party to the suit, and — the failure to sue the said Dillingham on account of his said possession and the holding of the court as in said assignment of error shown the failure of this court to pass upon the same was error, and for which error the appellants now here request the same to be reviewed.

Third.

The court erred in not passing upon and sustaining the third assignment of error, the effect being virtually to overrule defendant's exception to plaintiff's petition, the assignment of error bring-

ing into question the sufficiency of plaintiff's petition and raised the question as to whether or not the allegations of same would entitle plaintiff to recover the land sued for upon any ground alleged in plaintiff's petition, and because the said petition did not show wherein the railway company was not entitled to certificates for sidings or otherwise invalid, and because the petition showed upon its face that at the time the certificates were issued there was no prohibition in the constitution or laws of the State of Texas denying to the defendant the right to receive the certificates, and the said petition nowhere by any sufficient allegation negatived the right of appellant under its charter and other laws of the State of Texas authorizing the same, and nowhere showed that the said certificates so issued to the said railway company were invalid or were unlawfully issued to it.

Fourth.

The court erred in not passing upon appellants' fourth assignment of error, which raised the question as to the right of the attorney general of the State of Texas to institute the suit without direct authority from the executive department, there being no law in existence or in force at the time which would authorize the attorney general, upon his own motion, to institute a suit for the recovery of land or for the cancellation of land certificates or patents to land; and the court further erred in not considering the question raised in said assignment calling into question the right of plaintiff to prosecute the said suit upon exceptions thereto without allegations in the petition alleging that the attorney general was authorized to institute the suit, and in not requiring the attorney general, upon the demand of appellants, to allege and show what the authority, if any, was, whether written or verbal, general or special, that authorized the institution of said suit.

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Fifth.

The court erred in overruling and in effect holding not well taken appellants' 5th assignment of error, to the effect that the land sued for, although embraced in what is generally known as the "Texas and Pacific reservation," were not located by virtue of a valid file, and in holding that "a sort of blanket file seems to have been made or attempted in behalf of the Houston & Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land." Nothing further seems to have been done in pursuance of this file until the locations were made in June of the succeeding year.

The evidence introduced on the trial of said cause does not support the conclusion of this honorable court upon that point, because on the 28th day of July, 1872, the Houston & Texas Central Railway Company made a valid file through the proper surveyor's district, which file was in force and effect prior to the creation of said reservation, and that the lands sued for by plaintiff were by the said

railway company surveyed within the said file and within twelve months after the same had been made. See the file made through Robert Elgin, the land agent, and filed in the office of the county surveyor on the 28th day of July, 1872, to be found on Trans., p. 104 and 105 ; also see the map introduced by agreement of parties, showing the tracings of the file upon the land, and which shows all the land sued for, except survey numbers 160 and 191, by virtue of certificate Nos. 38-4438, 38-4443, embraced within the boundaries thereof. The file was not a blanket file, as called by this honorable court, but was such a file as was authorized to be made, and the particular certificates for which the particular sections of land were surveyed are included in and embraced within the particular 152 file. By comparing the certificates numbers with the certificate numbers embraced within the file and the survey number given, the court will see that it has made a very serious error in ruling that the certificates were not embraced in and that any particular certificate was not applied to any particular section of land.

The findings of fact nor the statement of fact will sustain the court in its conclusion, two of which sections only are not embraced within this file, to wit, surveys 169 and 191 ; and the court therefore erred in holding that the appellants had no valid file.

The case of Jumbo Company vs. Bacon & Graves, 79th Texas, is not authority in this, because, as will be shown, if the court will examine the record in the case of Bacon & Graves in vol. 2, court of civil appeals, p. 692, it will be observed that Bacon & Graves disclaim all interest in and to certain surveys made by the Houston & Texas Central Railway Company in block 97, where the said railway company had a prior file. For part of block 97 there was a file made in which the certificates were not applied to the file, and consequently the Bacon & Graves location was conceded to be superior to the railway company's surveys, unless the act of 1873 proved to be constitutional. Appellants contend that the very language of the act of 1873 recognizes, as shown in sections 5 and 6, that nothing contained in said act should be construed to impair or affect the rights of any person or persons thereto where legally acquired within said reservation.

So far as the act passed May 2, 1873, which was not approved by the governor, entitled "An act to adjust and define the rights of the Texas Pacific railway within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," is concerned, the same is unconstitutional and void, in that

from the caption of the one it purports merely to "adjust 153 and define the rights of the Texas Pacific railway within the State of Texas," and does not purport to nor contemplates granting land or creating reservations to entitle the Texas & Pacific to acquire and locate land ; and section sixth of said act contemplates to grant by reservation a new and additional width of territory on each side of the 16 miles of reservation of the old Memphis, El Paso & Pacific Railroad Company reservation not there-fore granted. This will make 80 miles in width from the 23rd meridian

of longitude west to the east boundary line of New Mexico and to a point south of the southeast corner of said Territory of New Mexico—that is to say, taking the centre line of said Memphis-El Paso reservation and extending 40 miles on northern side thereof and after reaching the said point south of and opposite to the southeast corner of New Mexico to said reservation of the unappropriated public domain is hereby continued 80 miles in width, etc., extending westward to the Rio Grande and bounded on the north by New Mexico, the same to include the Memphis-El Paso reservation hereinbefore mentioned, which reservation as herein continued and set apart shall continue to be so reserved and set apart for the purpose herein mentioned until the year 1880 and no longer.

Section seven of said act requires the commissioner of the general land office to designate upon the maps of his office the said reservation.

Section II of said act as a condition precedent requires the Texas & Pacific Railway Company, by their board of directors, within fifteen days after the date of approval of the act, to signify to the governor by telegraph or otherwise the acceptance or rejection of the terms and conditions of the act, and within thirty days from the date of approval to file a formal acceptance or rejection of the same with the secretary of the State of Texas. The act was not approved

by the governor. The evidence fails to show upon the part 154 of the State that any condition whatever required to be done if the act should be held to be a valid act was performed upon the part of the railroad company, and that the same became and was a completed contract, so that the reservation was in fact made for the benefit of the said Texas & Pacific Railroad Company.

As will be seen, the court therefore erred in holding in effect that said assignment of error was not well taken, and that said lands were located in the "Texas & Pacific reservation," and that appellants' rights to acquire the same were lost to it on account of the said reservation.

Sixth.

The court erred in not holding that the sixth assignment of error was well taken, which raises the question as to the right of the State of Texas to bring the suit for the recovery of land, which lands were in the possession and control of a receiver of a Federal court, acting under the decrees and order of the Federal court having the ultimate control and disposition of the land.

When the property and possession of said property was by virtue of the proceedings of the said United States circuit court drawn to the said United States circuit court the effect of the said proceedings — equivalent to a sequestration and was a proceeding *in rem*, and the property therefore, by virtue of said receivership, was in the possession and custody of the court. The suit was not one of that class of suits which would be authorized upon the ground that the same was "in respect to any act or transaction of his (receiver) in carrying on the business connected with such property," but was property and assets in the custody of the court, subject to the dis-

position of the court, subject to the lien impressed upon the property by the order and decrees of said court, and subject to the mortgage lien which was sought to be foreclosed in the Federal court,
155 the prayer of plaintiff being for judgment for possession of and title to the land, as well as for a decree cancelling the certificates; for a removal of cloud cast upon the State's title, for damages and costs. See Trans., pp. 6, 7-9, plaintiff's petition.

Seventh.

The court erred in not considering and in not holding as well taken appellants' assignment of error contained in the 7th assignment of error that the law of January 30, 1862, and its acceptance by the Houston & Texas Central railway by the resolutions passed by its board of directors November 5, 1862, restoring the stockholders to their original position in the company, was a contract by and between the State of Texas and the Houston & Texas Central Railway Company, which entitled said railway to all the rights and privileges of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation of section 10, art. I, of the Constitution of the United States, and of the constitution of the State of Texas.

The said act of January 11, 1862, provided that the time of the continuance of the war between the Confederate States and the United States of America should not be computed against any internal improvement in reckoning the period allowed them for their charter by any law, general or special, for the completion of any work contracted by them to do. There were two laws passed upon the same day, and both of those laws provided as a condition precedent for the Houston & Texas Central Railway Company to receive the benefits of said act that the company should pass
156 a resolution restoring the original *bona fide* stockholders thereof, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of the road to W. J. Hutchins *et al.* The railway company did pass the resolutions, and the original *bona fide* stockholders of said company who paid for their stock were restored to all of the rights and privileges to which they were entitled previous to the sale, and by virtue of which the said railway company became entitled to receive all of the benefits of the act of January 30, 1854, granting land to railroads in virtue of its charter and the other laws, general and special, of the State of Texas, and the right of the railway company became fixed to acquire these lands by the express contract so entered into by and between the State of Texas and the said railway company, for a valuable consideration, in addition to the considerations which the State received by reason of the construction of works of internal improvement.

Eighth.

The court erred to the effect in not holding that the 8th assignment of error was well taken, calling into question the action of the court below in holding that the said act of January 23, 1856, authorizing the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway Company, because there was granted to the Houston & Texas Central Railway Company by virtue of the act approved February 14, 1852, by virtue of section 14 thereof, eight sections of land of 640 acres each for every mile of railway actually completed by it and ready for use; and further provided in said section that said certificates shall be for 640 acres each and located upon an unappropriated public domain in the State of Texas; and it was further provided in section 17 of said act "that it shall be lawful for any of the railways hereafter to be constructed to cross the said railway or any branch thereof or to connect at any point therewith."

It was provided by an act approved February 7, 1857, entitled "An act supplemental to the acts to establish the Galveston & Red River Railway Company," authorizing it to make and construct, with the original railway described in said acts establishing said company, a branch thereof toward the city of Austin under the same restrictions and stipulations provided in said original acts and subject to the rights of the State to regulate the tolls by general law, that the act approved January 23, 1856, gave the Galveston & Red River railroad six months after the 30th day of January, 1856, to complete the first 25 miles of their road, commencing at the city of Houston, and provided also that the said company shall be entitled to the rights and benefits granted by an act approved January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land." The act further provided in section 1 that said company shall be required to complete the main trunk of said road to the 32nd degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road; provided, further, that the act to regulate railroad companies, approved the 7th day of February, 1853, shall apply to this charter.

Section 3 of said act provided for the assignment of the land certificates to which the railroad company would be entitled, and section 4 thereof authorized the company to mortgage its land.

Section 5 thereof required the Galveston & Red River Railway Company to yield all general branch privileges except such as are specially granted by the provision of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branches as shall be expressly subscribed to such branches, and shall not expend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk on to the point on Red river contemplated in its charter or to such point or intersection between said road and some other road running from the northern or eastern boundary of Texas

toward El Paso as shall be agreed upon between the directors of said company.

Section 6 provides that nothing shall be construed in the application to affect the right of the State to appeal or modify the act of January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of lands;" provided that the rights and lands acquired before said repeal or modification shall in all cases be protected.

By an act of February 1, 1856, the name of the Galveston & Red River Railway Company was changed to that of the Houston & Texas Central Railway Company. By an act of September 21, 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company;" there was granted by section 1 thereof to the Houston & Texas Central Railway Company a grant of 16 sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company; provided that the lands heretofore drawn by the said company by virtue of an act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30, 1854, to be deducted from amounts of land granted hereby, and by virtue of an act approved November 13, 1866, entitled "An act for the benefit of railroad companies," it was provided that the grant of 16 sections of land to the mile of railroad companies heretofore or hereafter constructing railroads in Texas shall be extended 159 under the same restrictions and limitations herein provided by law for ten years after the passage of this act."

It is error, therefore, in not holding that the said assignment was not well taken, and that the act of January 23, 1856, authorized the legislature to repeal the act of January 30, 1850, in so far as it affected the prior rights of the Houston & Texas Central Railway Company by virtue of the act of January 30, 1854, and Sept. 26, 1866, or any other acts, special or general, of the legislature authorizing the said railway company to acquire 16 sections of land to each completed mile of railway.

Ninth.

The court further erred in not holding as well taken the assignment that the special act approved February 4, 1858, in so far as the same could be held to grant land to the Houston & Texas Central railway, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation, because, in pursuance of the several acts of the legislature passed in 1862-'66 and other general and special laws, the same was continued in force long after the repeal of the constitution of 1869-'70, and by virtue of the said laws and the decision of the supreme court the act of January 30, 1854, was continued in force beyond the adoption of said constitution and long after the amendment of said constitution and long after its ratification, in 1873.

Tenth.

The court erred in not sustaining appellants' 9th assignment of error and in effect holding that the war between the States closed in Texas on the 28th day of May, 1865, instead of August 20, 1866, as determined by the supreme court of Texas in *Grigsby vs. Peake*, 54th Texas, p. 149, and Supreme Court of United States in *Freeborn vs. The Protector*, 12th Wallace, p. 702, and also as to the date when the act of January 30, 1854, expired and ceased to be in force and effect in so far as appellants' rights are concerned.

Eleventh.

The court erred in not holding that the 11th assignment of error was well taken, the effect of which holding was that the act approved November 13, 1866, is in conflict with the constitution of 1866 and previous constitutions of the State, and that the same was null and void. The act of November 13, 1866, has been held in the recent cases referred to of *Quinlan vs. Railway and G., H. & S. A. Ry Co. vs. The State* to be valid laws and to have been validly passed.

Twelfth.

The court erred in not sustaining appellants' 12th assignment of error, the action of the trial court being to the effect that the railway company could not claim land under the special act of September 21, 1863, granting 16 sections of land to the mile of completed track, holding that the railway company had forfeited its right to acquire 16 sections of land to the mile of completed road because the same was not completed 50 miles within two years from January 1, 1867, and 75 miles within three years from that date—

The time in which to complete the miles of road having been extended by that and subsequent legislation, and for the further reason that the State waived its claim to the land by extending the time, and for the further reason that the State of Texas never undertook to assert any right, and the completion of the railroad within the stated period of time was not a condition precedent.

Under and by virtue of all of said general and special laws, and especially by the act of September 21, 1866, there was granted to said railway company 16 sections of land of 640 acres each for every mile it has constructed or may construct and put in running order, the proof having shown that the fourth section of 25 miles was completed to Bryan August 27, 1867, within the time required by the act of September 21, 1866, requiring the said road to be completed to Bryan and cars run thereon by the twenty-first day of September, 1867. See Record, p. 53.

Thirteenth.

The court erred in not holding that the 13th assignment of error was not well taken and overruling the same, to the effect that the court could inquire into the facts and go behind the action of the

executive of the State of Texas to ascertain whether or not any part of the particular road was completed within the stated period of time, and thus go behind the action of the executive department of the State to reopen the same and to determine in the face of the written testimony, to wit, the certificates, reports of the engineer, and approval of the governor, to show that their acts were not conclusive in the absence of any allegation of fraud or mistake.

Fourteenth.

The court erred in not holding as well taken and in not passing upon the 14th assignment of error, to the effect that the court below erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, was in conflict with the constitution and null and void, for this, the constitution of 1869 had prospective effect and did not relate to or affect the right of the Houston & Texas Central railway to earn lands, and the construction given to the constitution of 1869 that it repealed all laws granting lands to the Houston & Texas Central Railway Company and prohibited the legislature from passing the act of August 16, 1870, authorizing it to acquire the Washington County road from Hempstead, a place on the main line of the Houston & Texas Central railway, to Brenham and to build from Brenham to Austin. The railway company, by virtue of its charter and general laws and the act of 1870, had full authority to construct the road to Austin and to acquire land certificates, and the act of 1870 was a valid law, there being no legislative prohibition against the same.

The Houston & Texas Central Railway Company had no new land granted to it, but *were* receiving lands for constructing its road to which it was entitled under previous laws.

The effect of the act of 1870 merely authorized the railroad company, instead of building so much of its road from a point on its main line, to acquire the same by purchase, and from thence to build to Austin; that the charter right to build to Austin was granted by the prior legislation. The power to acquire the land was vested in the railway company and the same was no new grant, but was such a law as could be passed by legislative authority.

Fifteenth.

The court erred in not sustaining the 15th assignment of error and in not holding that F. P. Olcott purchased the lands without any notice that the same were not valid; that he purchased the same under foreclosure mortgages hereinbefore referred to, under which all of the lands of the said railway company were sold; that the Houston & Texas Central railway was a corporation organized under the laws of the State of Texas prior to January 30, 1854; that it was constructed under and by virtue of the laws of 163 Texas, both general and special, and by virtue of the acts of 1866 that granted to it 16 sections of land of 640 acres to the mile of completed road; that by virtue of the general and special laws and by virtue of the amendments of the constitution adopted

by the legislature in 1873, and there being nothing on the face of the certificates to put Olcott upon any notice of any defect, if any, in his title, and especially the action of the State of Texas and her officers in permitting said lands to be surveyed and recognized in the land office as the lands of the railway company and patenting other land by the same series, and the issue of certificates was such as to lead Olcott to believe that if the State of Texas had any claim whatever it had waived the same, and in so far as the said laws were concerned the said railway company was entitled to the land grant.

Sixteenth.

The court erred in holding as not well taken the 16th assignment of error. The railway company, by virtue of the act of January 30, 1854, and September 21, 1866, and November 13, 1866, and other general and special laws—the Houston & Texas Central railway—was entitled to all the rights, privileges, and grants made in said laws for land, for there was nothing in any of said acts denying to the railroad company all the rights, privileges, and grants of land made to it to acquire 16 sections as aforesaid to the completed mile of road.

Seventeenth.

The court erred in not holding that the 17th assignment of error was well taken. The act of January 30, 1854, and the several amendments and supplements thereto, and the act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866 and provisions of the constitution of 1869
164 and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of limitations, and the act of March 30, 1870, extended the operation of the act of January 30, 1854, irrespective of either the law of September 21, 1866, or November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinances of said convention as to setting the operation of laws of the statute of limitations giving to the Houston & Texas Central railway all the rights, benefits, and grants preserved by said act of January 30, 1854, including the grants of land for necessary sidings and turnouts until March 30, 1870.

Eighteenth.

The court erred in not sustaining this assignment.

The court erred in going behind *this assignment*. The action of the governor who appointed the engineer to inspect the road when completed and report upon the same, the said governor being constituted the sole and final judge of whether the necessary antecedent acts had been done and performed, and the decision that the railroad company had done and performed the conditions precedent to its right to acquire land, as evidenced by the certificates of the land commissioners, are conclusive and final, and there was no power in the court to review the act, and the conclusions of the con-

stituted officers, acting within the scope of their authority, was conclusive; that — the date of the issuance of the certificates to the company there was no inhibition in the constitution of the State of Texas against the legislature granting lands to railroads; the constitution of 1869-'70, acting prospectively, could impose no restriction upon any legislation affecting the rights of the H. & T. C. R'y Co.

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Nineteenth.

The court erred in not holding as well taken the 19th assignment of error, and the effect of the holding of the court is that the construction placed upon the right of the railway company to acquire these lands by the executive department of the State would not be considered by the court.

Twentieth.

The court erred in not holding as well taken the 20th assignment of error. This assignment of error is to the effect that all the lands granted to the railway company were surveyed and returned as the law requires. Therefore the said acts and said acquiescence on the part of the State and her laches continued for so long and so constituted a waiver upon the part of the State, if any it ever had, in and to such land: field-notes returned to the general land office; books, plats, and sketches made and used as archives in the land office in the counties where the land was situated and endorsed as the lands of the Houston & Texas Central Railway Company; the executive construction placed upon the same; the legislative permission and authority to mortgage the same for the purpose of construction; payment of taxes thereon, and finally the foreclosure and purchase by Olcott.

Twenty-first.

The court erred in not holding that the 21st assignment of error was not well taken, because of the charter of the said railway company and the several acts amendatory thereof and supplements thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision of *Railway vs. Commissioner*, 36th Texas, p. 383; *Davis vs. Gray*, 16th Wallace, p. 166 203, and the executive construction as to the right to acquire land within the period of thirty years. Executive, judicial, and legislative construction placed upon said charter and laws of this State establish a rule of property and a property right of defendants in and to the land sued for, and their deprivation of said land, through a new rule and through a new construction of said law, was the taking of appellants' property without due process of law, and constituted the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through their charter and amendments thereto and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly the 10th section of the 1st article

and 14th article of amendments thereof, is a taking of plaintiff's property without due process of law, and therefore null and void.

Twenty-second.

The court erred in not holding the 22nd assignment of error well taken and in effect overruling the same, because the court below erred in striking out the answer of C. C. Gibbs to interrogatories 4, 5, and 6, and exhibits thereto, as shown by bill of exceptions No. 1, because the testimony was offered under the allegations and in behalf of appellants' defense, not excepted to, and for the purpose of showing that the defendant had lost, by reason of adverse location and by reason of the "Pacific reservation," more lands than it had received from the State of Texas under and by virtue of the same issued for sidings; so that in case the court would hold that the railroad company was not entitled to certificates for sidings upon that part of the road for which certificates involved in this suit were issued, it had not received as much land as it had located certificates for main line; and the testimony of Geo. W. Polk was 167 to the same effect was also excluded, over the objection of appellants, for same reason.

Twenty-third.

The court erred in not reversing said cause and in not rendering judgment for appellant for the land in controversy, because it was shown by the uncontradicted evidence that appellant was entitled to such land by virtue of its charter and amendments thereto and the general laws granting lands to railroad companies, and especially granting land to the Houston & Texas Central Railway Company, and that it had acquired the right to the same prior to the adoption of the constitution of 1869-'70 by virtue of its said charter and by virtue of the amendments thereto, the said laws, and the construction and completion in part of its line of railway, and that such right could not be taken away by said constitution, if it was so intended, without violating art. I of section 10 of the Constitution of the United States and the 14th article of amendment to said Constitution.

It is shown, as stated, that appellants had organized its road under the special acts granting lands and the laws amending its charter, and had constructed a large portion of its line of railway prior to the adoption of the constitution of 1869. It had therefore accepted the grant and expended a very large amount of money in earning the same before the adoption of the constitution of 1869-'70, and thus acquired the vested right to said grant, which could not be taken away or impaired by the constitution of 1869-'70 without violating the Constitution of the United States.

Twenty-fourth.

The court erred in not reversing said cause and rendering judgment for appellants for the land sued for, because the defendant

168 was, if for no other reason, entitled to said land under and by virtue of the act of August 15, 1870, merging the Washington County road into the Houston & Texas Central Railway Company, and of the special acts relating to said company, and was entitled to the same by virtue of the amendments to section 6, art. 10, of the constitution of 1869, adopted by the people in November, 1872, and ratified by the legislature in March, 1873.

The adoption as aforesaid of the amendment to section 6, art. 10, of the constitution of 1869 related back as of the date of the adoption of the constitution of 1869 and removed all constitutional inhibition, if any, of the right to make such grants and gave full force and effect to the provisions of the said act of July 27, 1870, and prior legislation granting such lands to appellants.

Twenty-fifth.

The court erred in not holding that if the said Houston & Texas Central Railway Company was not otherwise entitled to the land sued for, it was entitled to said land by virtue of the provisions of the act of August 16, 1876, granting 16 sections of land to all railroad companies for every mile of railway completed and put in running order. The act incorporating the Houston & Texas Central Railway Company and other special acts relating to it showed, and other evidence tended to show, that appellants came within the provisions of the act of August, 1876, and by virtue of said act and all other acts appellant was entitled to all the benefits thereof, there being nothing to show that appellant was excepted from and was not entitled to the benefits of said law.

Twenty-sixth.

169 The court erred in not holding that appellants were entitled to be reimbursed for all sums of money paid by it in respect to surveying the lands, correcting the field-notes, paying taxes thereon, and in otherwise improving the said lands. When the State instituted the suit she subjected herself to the jurisdiction of the court to the same extent as any other litigant, so far as concerned all equitable and all legal defense to her claim, and she can claim equitable relief only when entitled upon principles of equity and good conscience.

Twenty-seventh.

The court erred in not reversing said cause and rendering judgment in favor of appellant and in not holding that the governor, in obedience to law, having appointed an engineer to inspect the road, was not the sole and exclusive judge as to whether the facts entitling appellant to certificates for lands in question existed.

The amendment to section 6, art. 10, of the constitution of 1869-'70 having been adopted and the constitutional restriction, if any, upon the granting of said land having been removed, appellant was entitled at the time the certificates in question were issued to the lands

in question for the construction of the road, and the fact of such construction having been ascertained and determined by the executive department of the State in the manner provided by law, the finding and decision thereof in accordance thereto was final and conclusive as to the time and manner when said work was done and performed and the certificates were earned.

Twenty-eighth.

The court erred in not rendering judgment reversing said cause in favor of appellants because it appeared from the special acts incorporating the Houston & Texas Central Railway Company 170 and relating to it, the law granting land to said railway company under and by virtue of said special act, and other laws, both general and special, and from the decisions of the supreme court of the State of Texas and the Supreme Court of the United States, and the uniform construction placed upon such laws by the executive department of the government — established a rule of property with respect to such land, and a vested right under such law grew up in favor of appellant, which were violated and taken away by the judgment of the court below, and the construction placed upon said law by said court was contrary to the Constitution of the United States and the amendments thereof.

Twenty-ninth.

The court erred in not reversing the judgment of the court below and rendering judgment in favor of appellant because the undisputed evidence showed that in 1870, when the law was passed merging the Washington County road into the H. & T. C., the legislature contemplated submitting for the adoption of the people the amendment to section 6, art. 10, of the constitution of 1869, removing the restriction, if any, upon appellant's right to acquire the land under its original charter and the several acts amendatory thereof and supplemental thereto or under the general laws of the State. See *Railway vs. Groos*, 47th Texas, p. 408.

Thirtieth.

The court erred in not reversing the judgment of the lower court and not rendering the same in favor of appellant, and in fact holding that the constitution of 1869, art. 10, section 1, deprived appellant of the 16 sections of land for each mile of railroad constructed by it granting to the Houston & Texas Central Railway Company 171 and the several acts amendatory and supplemental thereof and the general laws of the State upon the subject theretofore in force. This land, including all that now in controversy, was recovered by the State and judgment affirmed by this court, because the court holds the constitution of 1869 took away from the defendant the right to acquire further land, and both defendant and the legislature *was* powerless, the one to grant and the other to receive the land to which it was entitled under all the char-

ter amendments and supplements and general and special laws of the State of Texas granting lands to railroads, and particularly to appellant company, and which action of the court in so holding and in so construing the law impairs the obligation of appellant's contract whereby it was entitled to receive said land grants, and it destroyed appellant's vested rights to said land, contrary to section 10 of art. 1 of the Constitution of the United States.

Thirty-first.

The court further erred that the Houston & Texas Central Railway Company extended its road from Brenham to Austin between the date of the special act and the 25th day of December, 1891. This is, of course, the mistake of typewriter, as the road was finished 25th day of December, 1871. Record, p. 101.

The court erred, for the reasons stated, in holding that the lands were located in the "Pacific reservation," because the "Pacific reservation" was created after the file of the railroad, which was made 28th day of July, 1873. Record, p. 105. And further holding: "A sort of blanket file seems to have been made or attempted in behalf of the Houston & Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land. Nothing further seems to have been done in pursuance of this file till the locations were made in June of the succeeding year."

172 The court has committed a grave error in the facts on this point, and appellants request another and more perfect finding of facts upon the point of file. The facts are as follows: The statement of facts on page 104 of the Record shows that "defendants also introduced in evidence the file made by the Houston & Texas Central Railway Company upon said lands dated July the 28th, 1872."

STATE OF TEXAS, }
County of Bexar. }

To the surveyor of Bexar district:

By virtue of futy certificates issued to the Houston & Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your land district, to wit, on the waters of the Colorado and Clear fork of the Brazos, in Taylor county: Beginning at the S. E. corner of John Trussell's $\frac{1}{2}$ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to or Martinez's N. E. corner; thence S. E. with Martinez, C. Colenck, Ed. Taylor, and Jas. Jeffries' E. lines to Davis Harrison;

thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, T-os. Linsey, and Elisch Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the John Forbes survey; thence north with Forbes, C. M. Jackson, W. F. Sparks, Robert Triplett, and John Kincaid to the N. W. corner of the latter; thence east with Kincaid and Triplett to Smith league and with its W. and N. lines to the N. E. corner of the lines between Bexar and Travis district; thence N. W. with said line to the beginning.

ROB'T M. ELGIN,
Land Agent H. & T. C. Ry.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountain pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, p. 131.

C. HARNETT, *D. L. B. D.,*
By L. C. NAVARRO, *Dep.*

I, W. M. Lock, district surveyor Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pp. 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCK,
District Surveyor Bexar District.

The file was also filed in the general land office of Texas. See Record, p. 106.

The suit is to recover land, the certificate number and 174 survey number of which are as follows:

Certificate No.	Survey No.	Block No.
38/4438.....	169	64
38/4443.....	191	"
40/4997.....	199	"
40/4998.....	201	"
40/4999.....	203	"
40/5001.....	207	"
40/5002.....	209	"
40/5003.....	211	"
40/5004.....	213	"
40/5005.....	215	"
40/5006.....	217	"
40/5019.....	243	"
40/5020.....	245	"
40/5021.....	247	"
40/5022.....	249	"
40/5023.....	251	"

(Record, p. 2.)
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The surveys were located in said file by virtue of certificates numbered from 40/4997 to 40/5036, inclusive. It will thus be seen that survey No. 169 is located by virtue of certificate 38/4438 and is not covered by the file, and survey No. 191 is located by virtue of file No. 38/4443 — is not covered by the file; surveys numbers 169 and 191 only are not embraced in the file, and if the "Pacific reservation" is a valid act these two surveys are affected by it, but all the others are prior to it. The court misapprehends the law in force which gave parties who made files on land 12 months thereafter in which to survey the lands by virtue of the certificates.

So, then, from the 28th day of July, 1872, the date of filing (Record, p. 105), to 7th day of June, A. D. 1873, the date when the lands were surveyed, Record, p. 2, constitutes a period of time less than twelve months. The act creating the "Pacific reservation" was passed May 2, 1873, but was not approved by the governor. It was passed while the file above referred to was in existence and had not expired.

The findings of fact and conclusions of law were filed by the district judge who tried the cause without any request of the parties; that the same were not full enough to be considered as the material facts, and the parties filed an agreed statement of facts as provided by law. See Record, p. 79 to 134, inclusive. The court cannot rely on the findings of fact below, as there was no finding whatever that appellants had a file, and appellants request the court to find additional facts, and especially to set out in the findings appellant's file on pages 104, 105.

Thirty-second.

The court erred in holding in effect that the constitution of 1869 (art. 10, sec. 6) stand in the way of any grants of land to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County railroad from Brenham to Austin, was passed, "for if the effect of the same was to repeal land grants to the Houston & Texas Central Railway Company, then the same impaired the obligation of appellants' contract right to acquire 16 sections of 640 acres of land for each and every mile of road constructed and to be constructed by said railroad company."

By virtue of the act entitled "An act supplemental to the acts to establish the Galveston & Red River Railway Company," approved February 7, 1853, the said railway company was authorized "to build a branch thereof towards the city of Austin under the restrictions and stipulation provided in said original act," etc.

The act approved September 1, 1856, granted to said company "the rights, benefits, and privileges granted by an act approved January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands.'" This act further provided "that said company shall be required to complete the main trunk of said road to the 32nd degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red

176 river before they shall commence any branch road." Sec. 5 of said act required the railroad in accepting the benefits of said act to yield all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red river contemplated in its charter," etc.

The act of September 21, 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company," granted to it "16 sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company."

The State having contracted with said railway company to grant it land for every mile of road it has constructed or may construct, it was error to hold that the same was cut off by virtue of the constitution of 1869 (art. 10, sec. 6) or to hold that the act of 1870, merging into the Houston & Texas Central Railway Company the Washington County railroad, which began at Hempstead, a point on the main trunk line of the Houston & Texas Central Railway Company, and terminated at Brenham, and allowing said latter-named road to construct from Brenham to Austin, was other than to merge said road and relieve the company from beginning its road on the main line, and that it granted any new or greater power than it already possessed to acquire lands by building to Austin, and that by reason of said act of merger of August 15, 1870, the right to acquire the land was not cut off by the constitution of 1869-'70.

The road to Austin was completed simultaneously with the main line.

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Thirty-third.

The court erred in holding that appellants' right to acquire 16 sections of land to the mile was dependent alone upon the general law passed on that subject in 1854 and extended for ten years in 1866, and that law denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right to receive any grant of land for any branch road," because, as already shown, the said railway company had a charter right to build to Austin and an independent contract right to "sixteen sections of land of 640 acres of land each for every mile of road it has constructed or may construct and put in running order." Neither the act of January 23, 1856, nor the act of September 21, 1856, nor any other law limited the right of the Houston & Texas Central Railway Company to acquire land alone to the main line of road.

Thirty-fourth.

The appellants further claim that this court has committed an error in affirming this case, because the rights of the Houston &

Texas Central Railway Company to acquire land for the construction of its railway was granted by laws prior to 1869 and 1870, and the right to acquire the same was under laws in existence long after the entire railway was completed. By virtue of the charter of the said company and its amendments by the legislature there was no restriction in respect to the right of the company to acquire land for building to Austin; hence in holding that the constitution of 1869-'70 prohibited the legislature from passing the law of August 15, 1870, impairs the obligation of appellants to acquire land under its charter contract and is repugnant to the Constitution of the United States; and the said constitution of 1869-'70, so far as the same prohibited the legislature from granting any rights 178 to it to acquire land by virtue of its prior rights, is unconstitutional, null, and void, the object of the constitution of 1869-'70 being to prohibit future grants to railroads, but not intended to apply to those already organized and constructing railways under prior legislation.

Wherefore appellant prays the court to set aside its said judgment herein affirming the judgment of the court below and to grant it a rehearing.

Appellants represent that the Honorable M. M. Crane is the attorney general of the State of Texas and represents the appellee in said cause; that the said attorney general now resides and has his office in the city of Austin, county of Travis, and is attorney for appellee, The State of Texas, and appellant further prays for service of this motion to be made upon him as the law requires.

BAKER, BOTTTS, BAKER & LOVETT,
AND T. D. COBBS,

Attorneys for Appellants.

Filed May 18, 1896.

Amended Motion for Rehearing.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY }
et al., Appellants, }
vs. } No. 1525.

THE STATE OF TEXAS, Appellee. }

Now come The Houston and Texas Central Railway Company and F. P. Olcott, appellants in the above-styled cause, by attorneys, and ask leave to amend the motion heretofore filed herein, 179 and move the court to set aside the judgment rendered on the 9th day of May, 1896, in this cause affirming the judgment of the court below in the above-stated cause, and for grounds for a rehearing submit the following:

First. The court erred in not considering and in effect overruling appellants' first assignment of error, to the effect that the court below erred in overruling the appellants' plea to the jurisdiction of the

district court to try said cause, because it was shown that all the property of the Houston and Texas Central Railway Company, including the lands sued for, was in the hands of Charles Dillingham, as receiver thereof, appointed under the orders and decrees of the United States circuit court in consolidated cause No. 198, entitled "Nelson S. Easton *et al.*, trustees, vs. The Houston and Texas Central Railway Company *et al.*," pending long prior to the institution of this suit in the United States circuit court for the eastern district of Texas, at Galveston, and that said cause was instituted without permission of said United States circuit court or any one of the judges thereof, because the said Charles Dillingham, as receiver of the properties of the said railway company, was in possession of said property as receiver thereof, and was so placed in possession by the order and decree of the said United States court.

The facts in the case and the findings of the court below showed that the said receiver was in possession of the land sued for, as receiver of said United States circuit court.

Second. The court erred in not passing upon and considering appellants' first and second assignments of error and in effect overruling the same, because the assignments raised the question of want of proper parties to the suit, it being shown that Charles Dillingham, receiver, was in possession of the property sued for prior to the institution of this suit by virtue of an appointment made in consolidated cause

No. 198, entitled "Nelson S. Easton *et al.*, trustees, vs. The 180 Houston and Texas Central Railway Company *et al.*," pending in the United States circuit court for the eastern district of Texas, at Galveston, and by virtue of which appointment his possession was extended to and included, under the order of said United States circuit court, the land sued for in this suit, and so being in the possession of said property at the institution of said suit and at the final trial of said cause, he was therefore a necessary party to the suit, and the failure to sue the said Dillingham on account of his said possession and the holding of the court as in said assignment of error shown, the failure of this court to pass upon the same was error, and for which error the appellants now here request the same to be reviewed.

Third. The court erred in not passing upon and sustaining the third assignment of error, the effect being virtually to overrule defendant's exception to plaintiff's petition, the assignment of error bringing into question the sufficiency of plaintiff's petition and raised the question as to whether or not the allegations of same would entitle plaintiff to recover the land sued for upon any ground alleged in plaintiff's petition, and because the said petition did not show wherein the railway company was not entitled to certificates for sidings or that the same were otherwise invalid, and because the petition showed upon its face that at the time the certificates were issued there was no prohibition in the constitution or laws of the State of Texas denying to the defendant the right to receive the certificates, and the said petition nowhere by any sufficient allegation negatived the right of appellant under its charter and other laws of the State of Texas authorizing the same, and nowhere

showed that the said certificates so issued to the said railway company were invalid or were unlawfully issued to it.

Fourth. The court erred in not passing upon appellants' fourth assignment of error, which raised the question as to the right 181 of the attorney general of the State of Texas to institute the suit without direct authority from the executive department, there being no law in existence or in force at the time which would authorize the attorney general, upon his own motion, to institute a suit for the recovery of land or for the cancellation of land certificates or patents to land.

And the court further erred in not considering the question raised in said assignment calling into question the right of plaintiff to prosecute the said suit upon exceptions thereto without allegations in the petition alleging that the attorney general was authorized to institute the suit, and in not requiring the attorney general, upon the demand of appellants, to allege and show what the authority was, if any, whether written or verbal, general or special, that authorized the institution of said suit.

Fifth. The court erred in overruling and in effect holding not well taken appellants' fifth assignment of error, to the effect that the land sued for, although embraced in what is generally known as the "Texas and Pacific reservation," were not located by virtue of a valid file, and in holding and stating in the following language: "A sort of blanket file seem- to have been made or attempted in behalf of the Houston and Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land." Nothing further seems to have been done in pursuance of this file until the locations were made in June of the succeeding year.

The evidence introduced on the trial of said cause does not support the conclusion of this honorable court upon that point, because on the 28th day of July, 1872, the Houston and Texas Central Railway Company made a valid file through the proper surveyor's district, which file was in force and effect prior to the creation of the said reservation, and that the lands sued for by plaintiff were by the said railway company surveyed within the said file and within twelve months after the same had been made. See the file made through Robert Elgin, the land agent, and filed in the office of the county surveyor on the 28th day of July, 1872, to be found on Transcript, pp. 104 and 105; also see the map introduced by agreement of parties, showing the tracings of the file upon the land, and which shows all the land sued for, except survey numbers 169 and 191, by virtue of certificate numbers 38/4438, 38/4443, embraced within the boundaries thereof. The file was not a blanket file, as called by this honorable court, but was such a file as was authorized to be made, and the particular certificates for which the particular sections of land were surveyed are included in and embraced within the particular file. By comparing the certificate numbers with the certificate numbers embraced within the file and the survey number given, the court

will see that it has made a very serious error in ruling that the certificates were not embraced in and that any particular certificate was not applied to any particular section of land.

The findings of fact nor the statement of facts will sustain the court in its conclusion, two of which sections only are not embraced within this file, to wit, surveys 169 and 191; and the court therefore erred in holding that the appellants had no valid file.

The case of Jumbo Company vs. Bacon & Graves, 79th Texas, is not authority in this, because, as will be shown, if the court will examine the record in the case of Bacon & Graves in vol. 2, court of civil appeals, p. 692, it will be observed that Bacon & Graves disclaim all interest in and to certain surveys made by the Houston and Texas Central Railway Company in block 97, where the said railway company had a prior file. For part of block 97 there
183 was a file made in which the certificates were not applied to the file, and consequently the Bacon & Graves location was conceded to be superior to the railway company's surveys, unless the act of 1873 proved to be constitutional. Appellants contend that the very language of the act of 1873 recognizes, as shown in sections 5 and 6, that nothing contained in said act should be construed to impair or affect the rights of any person or persons thereto where legally acquired within said reservation.

So far as the act passed May 2, 1873, which was not approved by the governor, entitled "An act to adjust and define the rights of the Texas Pacific railway within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean," is concerned, the same is unconstitutional and void, in that from the caption of the act it purports merely to "adjust and define the rights of the Texas Pacific railway within the State of Texas," and does not purport to nor contemplates granting land or creating reservations to entitle the Texas and Pacific to acquire and locate land; and section sixth of said act undertakes to grant by reservation a new and additional width of territory on each side of the 16 miles of reservation of the old Memphis, El Paso and Pacific Railroad Company reservation not theretofore granted. This will make 80 miles in width from the 23rd meridian of longitude west to the east boundary line of New Mexico and to a point south of the southeast corner of said Territory of New Mexico—that is to say, taking the centre line of said Memphis, El Paso and Pacific Railroad Company reservation and extending 40 miles on either side thereof and after reaching the said point south of and opposite to the southeast corner of New Mexico to said reservation of the unappropriated public domain is hereby continued 80 miles in width, etc., extending westward to the Rio Grande and bounded on the north by New Mexico, the same to include
184 the Memphis-El Paso reservation hereinbefore mentioned, which reservation as herein continued and set apart shall continue to be so reserved and set apart for the purpose herein mentioned until the year 1880 and no longer.

Section seven of said act requires the commissioner of the gen-

eral land office to designate upon the maps of his office the said reservation.

Section eleven of said act as a condition precedent requires the Texas and Pacific Railway Company, by their board of directors, within fifteen days after the date of approval of the act, to signify to the governor by telegraph or otherwise the acceptance or rejection of the terms and conditions of the act, and within thirty days from the date of approval to file a formal acceptance or rejection of the same with the secretary of the State of Texas. The act was not approved by the governor. The evidence fails to show upon the part of the State that any condition whatever required to be done if the act should be held to be a valid act was performed upon the part of the railroad company, and that the same became and was a completed contract, so that the reservation was in fact made for the benefit of the said Texas and Pacific Railroad Company.

As will be seen, the court therefore erred in holding in effect that said assignment of error was not well taken, and that said lands were located in the "Texas and Pacific reservation," and that appellants' rights to acquire the same were lost to it on account of the said reservation.

Sixth. The court erred in not holding that the sixth assignment of error was well taken, which raises the question as to the right of the State of Texas to bring the suit for the recovery of land, which lands were in the possession and control of a receiver of a Federal court, acting under the decrees and orders of the Federal court having the ultimate control and disposition of the land.

185 When the property and possession of said property was by virtue of the proceedings of the said United States circuit court drawn to the said United States circuit court the effect of the said proceedings *were* equivalent to a sequestration and was a proceeding *in rem*, and the property therefore, by virtue of said receivership, was in possession and custody of the court. The suit was not one of that class of suits which would be authorized upon the ground that the same was "in respect to any act or transaction of his (receiver) in carrying on the business connected with such property," but was property and assets in the custody of the court, subject to the disposition of the court, subject to the lien impressed upon the property by the orders and decrees of said court, and subject to the mortgage lien which was sought to be foreclosed in the Federal court, the prayer of plaintiff being for judgment for possession of and title to the land, as well as for a decree cancelling the certificates; for a removal of cloud cast upon the State's title, for damages and costs. See Transcript, pp. 6, 7-9, plaintiff's petition.

Seventh. The court erred in not considering and in not holding as well taken appellants' assignment of error contained in the seventh assignment of error that the law of January 30th, 1862, and its acceptance by the Houston and Texas Central Railway Company by the resolutions passed by its board of directors November 5, 1862, restoring the stockholders to their original position in the company, was a contract by and between the State of Texas and the Houston and Texas Central Railway Company, which entitled said railway to all

the rights and privileges of the act of January 30, 1854, and the several amendments and supplements thereto, especially the right to the grants of land made therein, and that the said contract could not be impaired by any subsequent act of the State without violating the Constitution of the United States, especially in violation 186 of section 10, art. I, of the Constitution of the United States, and of the constitution of the State of Texas.

The said act of January 11th, 1862, provided that the time of the continuance of the war between the Confederate States and the United States of America should not be computed against any internal improvement in reckoning the period allowed them by their charter by any law, general or special, for the completion of any work contracted by them to do. There were two laws passed upon the same day, and both of these laws provided as a condition precedent for the Houston and Texas Central Railway Company to receive the benefits of the said act that the company should pass a resolution restoring the original *bona fide* stockholders thereof, those having paid for their stock, to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of the road to W. J. Hutchins *et al.* The railway company did pass the resolutions, and the original *bona fide* stockholders of said company who paid for their stock were restored to all of the rights and privileges to which they were entitled previous to the sale, and by virtue of which the said railway company became entitled to receive all the benefits of the act of January 30, 1854, granting land to railroads by virtue of its charter and the other laws, general and special, of the State of Texas, and the right of the railway company became fixed to acquire these lands by the express contract so entered into by and between the State of Texas and the said railway company, for a valuable consideration, in addition to the considerations which the State received by reason of the construction of works of internal improvement.

Eighth. The court erred in not holding that the eighth assignment of error was well taken, and calling into question the action 187 of the court below in holding that the said act of January 23, 1856, authorizing the State to repeal the act of January 30, 1854, granting lands to railroads in so far as the same affected the Houston and Texas Central Railway Company, because there was granted to the Houston and Texas Central Railway Company by virtue of the act approved February 14, 1852, by virtue of section 14 thereof, eight sections of land of 640 acres each for every mile of railroad actually completed by it and ready for use; and further provided in said section that said certificates shall be for 640 acres each and located upon the unappropriated public domain in the State of Texas; and it was further provided in section 17 of said act "that it shall be lawful for any of the railways hereafter to be constructed to cross the said railway or any branch thereof or to connect at any point therewith."

It was provided by an act approved February 7, 1853, entitled "An act supplemental to the acts to establish the Galveston & Red

River Railway Company," authorizing it to make and construct, with the original railway described in said acts establishing said company, a branch thereof toward the city of Austin under the same restrictions and stipulations provided in said original acts and subject to the rights of the State to regulate the tolls by general law, that the act approved January 23, 1856, gave the Galveston and Red River railroad six months after the 30th day of January, 1856, to complete the first 25 miles of their road, commencing at the city of Houston, and provided also that the said company shall be entitled to the rights and benefits granted by an act approved January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land." The act further provided in section I that said company shall be required to complete the main

trunk of said road to the thirty-second degree of north latitude
 188 or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road ; provided, further, that the act to regulate railroad companies, approved the 7th day of February, 1853, shall apply to this charter.

Section third of said act provided for the assignment of the land certificates to which the railroad company would be entitled, and section 4 thereof authorized the company to mortgage its lands.

Section 5 thereof required the Galveston and Red River Railway Company to yield all general branch privileges except such as are specially granted by the provision of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branches as shall be expressly subscribed to such branches, and shall not expend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk on to the point on Red river contemplated in its charter or to such point or intersection between said road and some other road running from the northern or eastern boundary of Texas toward El Paso as shall be agreed upon between the directors of said company.

Section 6 provides that nothing shall be construed in the application to affect the right of the State to repeal or modify the act of January 30, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of lands ;" provided that the rights to lands acquired before said repeal or modification shall in all cases be protected.

By an act of February 1, 1866, the name of the Galveston and Red River Railway Company was changed to that of the Houston and Texas Central Railway Company. By an act of September 21, 1866, entitled "An act granting lands to the Houston and Texas Central Railway Company ;" there was granted by section one thereof to the Houston and Texas Central Railway Company a grant
 189 of sixteen sections of land of six hundred and forty acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company ; provided that the lands heretofore drawn by the said railway company by virtue of an

act entitled "An act to encourage the construction of railroads in Texas by the donations of land," approved January 30, 1854, to be deducted from amounts of land granted hereby, and by virtue of an act approved November 13, 1856, entitled "An act for the benefit of railroad companies," it was provided that the grant of sixteen sections of land to the mile of railroad companies heretofore or hereafter constructing railroads in Texas shall be extended under the same restrictions and limitations herein provided by law for ten years after the passage of this act."

It is error, therefore, in not holding that the said assignment was not well taken, and that the act of January 23, 1856, authorized the legislature to repeal the act of January 30, 1850, in so far as it affected the prior rights of the Houston and Texas Central Railway Company by virtue of the act of January 30, 1854, and September 26, 1866, or any other acts, special or general, of the legislature authorizing the said railway companies to acquire 16 sections of land to each completed mile of railway.

Ninth. The court further erred in not holding as well taken the ninth assignment that the special act approved February 4, 1858, in so far as the same could be held to grant land to the Houston and Texas Central railway, ceased to be operative at the time the act of January 30, 1854, granting lands to railroads, expired by limitation, because, in pursuance of the several acts of the legislature passed in 1862-'66 and other general and special laws, the same was continued in force long after the repeal of the constitution of 1869-1870, and by virtue of the said laws and the decision of the supreme court the act 190 of January 30, 1854, was continued in force beyond the adoption of said constitution and long after the amendment of said constitution and long after its ratification, in 1873.

Tenth. The court erred in not sustaining appellants' tenth assignment of error and in effect holding that the war between the States closed in Texas on the 28th day of May, 1865, instead of August 20, 1866, as determined by the supreme court of Texas in *Grigsby vs. Peake*, 54 Texas, page 149, and Supreme Court of United States in *Freeborn vs. The Protector*, 12 Wallace, page 702, and also as to the date when the act of January 30, 1854, expired and ceased to be — force and effect in so far as appellants' rights are concerned.

Eleventh. The court erred in not holding the eleventh assignment of error was well taken, the effect of which holding was that the act approved November 13, 1866, is in conflict with the constitution of 1869 and previous constitutions of the State, and that the same was null and void. The act of November 13, 1866, has been held in the recent cases referred to of *Quinlan vs. Railway and G., H. & S. A. Ry Co. vs. The State* to be valid laws and to have been validly passed.

Twelfth. The court erred in not sustaining appellants' twelfth assignment of error, the action of the trial court being to the effect that the railway company could not claim land under the special act of September 21, 1866, granting 16 sections of land to the mile of completed track, holding that the railway company had forfeited its right to acquire 16 sections of land to the mile of completed road

because the same was not completed 50 miles within two years from January 1, 1867, and 75 miles within three years from that date—

The time in which to complete the miles of road having been extended by that and subsequent legislation, and for the further

191 reason that the State waived its claim to the land by extending the time, and for the further reason that the State of

Texas never undertook to assert any right, and the completion of the railroad within the stated period of time was not a condition precedent.

Under and by virtue of all said general and special laws, and especially by the act of September 21, 1866, there *was* granted to said railway company sixteen sections of land of six hundred and forty acres each for every mile it has constructed or may construct and put in running order, the proof having shown that the fourth section of twenty-five miles was completed to Bryan August 27, 1867, within the time required by the act of September 21, 1866, requiring the said road to be completed to Bryan and cars run thereon by the 21st day of September, 1867. (See Record, p. 53.)

Thirteenth. The court erred in holding that the thirteenth assignment of error was not well taken and overruling the same, to the effect that the court could inquire into the facts and go behind the action of the executive of the State of Texas to ascertain whether or not any part of the particular road was completed within the stated period of time, and thus go behind the action of the executive department of the State to reopen the same and to determine in the face of the written testimony, to wit, the certificates, reports of the engineer, and approval of the governor, to show that their acts were not conclusive in the absence of any allegation of fraud or mistake.

Fourteenth. The court erred in not holding as well taken and in not passing upon the fourteenth assignment of error, to the effect that the court below erred in holding that the act of August 15, 1870, enacted after the adoption of the constitution of 1869, was in conflict with the constitution and null and void, for this, the con-

stitution of 1869 had prospective effect and did not relate to 192 or affect the right of the Houston and Texas Central railway to earn lands, and the construction given to the constitution of 1869 that it repealed all laws granting lands to the Houston and Texas Central Railway Company and prohibited the legislature from passing the act of August 16, 1870, authorizing it to acquire the Washington County road from Hempstead, a place on the main line of the Houston and Texas Central railway, to Brenham and to build from Brenham to Austin. The railway company, by virtue of its charter and general laws and the act of 1870, had full authority to construct the road to Austin and to acquire land certificates, and the act of 1870 was a valid law, there being no legislative prohibition against the same.

The Houston and Texas Central Railway Company had no new land granted to it, but *were* receiving lands for constructing its road to which it was entitled under previous laws.

The effect of the act of 1870 merely authorized the railroad company, instead of building so much of its road from a point on its

main line, to acquire the same by purchase, and from thence to build to Austin; that the charter right to build to Austin was granted by the prior legislation. The power to acquire the land was vested in the railway company and the same was no new grant, but was such a law as could be passed by legislative authority.

Fifteenth. The court erred in not sustaining the fifteenth assignment of error and in not holding that F. P. Olcott purchased the lands without any notice that the same were not valid; that he purchased the same under foreclosure mortgages hereinbefore referred to, under which all of the lands of the said railway company were sold; that the Houston and Texas Central Railway Company was a corporation organized under the laws of the State of Texas prior to January 30, 1854; that it was constructed under and by virtue of the laws of Texas, both general and special, and by
193 virtue of the acts of 1866 that granted to it sixteen sections of land of six hundred and forty acres to the mile of completed road; that by virtue of the general and special laws and by virtue of the amendments of the constitution adopted by the legislature in 1873, and there being nothing on the face of the certificates to put Olcott upon any notice of any defect, if any, in his title, and especially the action of the State of Texas and her officers in permitting said lands to be surveyed and recognized in the land office as the lands of the railway company and patenting other land by the same series, *and* the issue of certificates was such as to lead Olcott to believe that if the State of Texas had any claim whatever it had waived the same, and in so far as the said laws were concerned the said railway company was entitled to the land grant.

Sixteenth. The court erred in holding as not well taken the sixteenth assignment of error. The railway company, by virtue of the act of January 30, 1854, and September 21, 1866, and November 13, 1866, and other general and special laws—the Houston and Texas Central Railway Company—was entitled to all the rights, privileges, and grants made in said laws for land, for there was nothing in any of said acts denying to the railway company all the rights, privileges, and grants of land made to it to acquire sixteen sections as aforesaid to the completed mile of road.

Seventeenth. The court erred in not holding that the seventeenth assignment of error was well taken. The act of January 30, 1854, and the several amendments and supplements thereto, and the act of January 11, 1862, extending the said act, and the several laws passed by the legislature of 1866 and provisions of the constitution of 1869 and the ordinances of the convention adopting the said constitution in relation not only to land grants, but also to the suspension of limitations, and the act of March 30, 1870, extended
194 the operation of the act of January 30, 1854, irrespective of either the law of September 21, 1866, or November 13, 1866, and that the said provisions of the constitution of 1869 and the ordinances of said convention as to setting the operation of laws of statute of limitations giving to the Houston and Texas Central Railway Company all the rights, benefits, and grants preserved by

the said act of January 30, 1854, including the grants of land for necessary sidings and turnouts until March 30, 1870.

Eighteenth. The court erred in not sustaining this assignment. The court erred in going behind the certificates. The action of the governor who appointed the engineer to inspect the road when completed and report upon the same, the said governor being constituted the sole and final judge of whether the necessary antecedent acts had been done and performed, and the decision that the railroad company had done and performed the conditions precedent to its right to acquire land, as evidenced by the certificates of the land commissioners, are conclusive and final, and there was no power in the court to review the act, and the conclusions of the constituted officers, acting within the scope of their authority, was conclusive. At the date of the issuance of the certificates to the company there was no inhibition in the constitution of the State of Texas against the legislature granting lands to railroads; the constitution of 1869-1870, acting prospectively, could impose no restriction upon any legislature affecting the rights of the Houston and Texas Central Railway Company.

Nineteenth. The court erred in not holding as well taken the nineteenth assignment of error, and the effect of the holding of the court is that the construction placed upon the right of the railway company to acquire these lands *would* by the executive department of the State — not be considered by the court.

200 Twentieth. The court erred in not holding as well taken the twentieth assignment of error. This assignment of error is to the effect that all the lands granted to the railway company were surveyed and returned as the law requires. Therefore the said acts and said acquiescence on the part of the State and her laches continued for so long constituted a waiver upon the part of the State, if any it ever had, in and to such land: field-notes returned to the general land office; books, plats, and sketches made and used as archives in the land office in the counties where the land was situated and endorsed as the lands of the Houston and Texas Central Railway Company; the executive construction was placed upon the same; the legislative permission and authority to mortgage the same for the purpose of construction; payment of taxes thereon, and finally the foreclosure and purchase by Olcott.

Twenty-first. The court erred in holding that the twenty-first assignment of error was not well taken, because of the charter of the said railway company and the several acts amendatory thereof and supplemental thereto, and the right to build the road to the city of Austin, granted to it by the legislature, and the decision of *Railway vs. Commissioner*, 36 Tex., p. 383; *Davis vs. Gray*, 16 Wallace, p. 203, and the executive construction as to the right to acquire land for the period of thirty years. Executive, judicial, and legislative construction placed upon said charter and laws of this State establish a rule of property and a property right of defendants in and to the land sued for, and their deprivation of said land, through a new rule and through a new construction of said law, was the taking of appellants' property without due process of

law, and constituted the impairment of a contract entered into between the State of Texas, on the one side, and the said railway company, through their charter and amendments thereto and legislation had in this State, on the other side, in violation of the Constitution of the United States, particularly the tenth section of the 196 first article and fourteenth article of amendments thereof, is a taking of appellants' property without due process of law, and is therefore null and void.

Twenty-second. The court erred in not holding the twenty-second assignment of error well taken and in effect overruling the same, because the court below erred in striking out the answer of C. C. Gibbs to interrogatories 4, 5, and 6, and exhibits thereto, as shown by bill of exceptions No. 1, because the testimony was offered under the allegations and in behalf of appellants' defense, not excepted to, and for the purpose of showing that the defendant had lost, by reason of adverse locations and by reason of the "Pacific reservation," more lands than it had received from the State of Texas under and by virtue of the same issued for sidings; so that in case the court would hold that the railroad company was not entitled to certificates for sidings upon that part of the road for which certificates involved in this suit were issued, it had not received as much land as it had located certificates for main line; and the testimony of Geo. W. Polk to the same effect was also excluded, over the objection of appellants, for the same reason.

Twenty-third. The court erred in not reversing said cause and in not rendering judgment for appellants for the land in controversy, because it was shown by the uncontradicted evidence that appellants were entitled to such land by virtue of its charter and amendments thereto and the general laws granting lands to railroad companies, and especially granting land to the Houston and Texas Central Railway Company, and that it had acquired the right to the same prior to the adoption of the constitution of 1869-1870 by virtue of its said charter and by virtue of the amendments thereto, the said laws, and the construction and completion in part of its line of railway, and that such right could not be 197 taken away by said constitution, if it was so intended, without violating article one of section ten of the Constitution of the United States and the fourteenth article of amendment to said Constitution.

It is shown, as stated, that appellants had organized its road under the special acts granting lands and the laws amending its charter, and had constructed a large portion of its line of railway prior to the adoption of the constitution of 1869. It had therefore accepted the grant and expended a very large amount of money in earning the same before the adoption of the constitution of 1869-1870, and thus acquired the vested right to said grant, which could not be taken away or impaired by the constitution of 1869-70 without violating the Constitution of the United States.

Twenty-fourth. The court erred in not reversing said cause and rendering judgment for appellants for the land sued for, because

the defendants were, if for no other reason, entitled to said land under and by virtue of the act of August 15, 1870, merging the Washington County road into the Houston and Texas Central Railway Company, and of the special acts relating to said company, and was entitled to the same by virtue of the amendments to section six, article ten, of the constitution of 1869, adopted by the people in November, 1872, and ratified by the legislature in March, 1873.

The adoption as aforesaid of the amendment to section six, article ten, of the constitution of 1869 related back as of the date of the adoption of the constitution of 1869 and removed all constitutional inhibition, if any, of the rights to make said grants and gave full force and effect to the provisions of the said act of August 15, 1870, and prior legislation granting such lands to appellants.

Twenty-fifth. The court erred in not holding that if the said Houston and Texas Central Railway Company was not otherwise entitled to the land sued for, it was entitled to said land by virtue of the provisions of the act of August 16, 1876, granting sixteen sections of land to all railroad companies for every mile of railway completed and put in running order. The act incorporating the Houston and Texas Central Railway Company and other special acts relating to it showed, and other evidence tended to show, that appellants came within the provisions of the act of August, 1876, and by virtue of said act and all other acts appellants were entitled to all the benefits thereof, there being nothing to show that appellants were excepted from and were not entitled to the benefits of said law.

Twenty-sixth. The court erred in not holding that appellants were entitled to be reimbursed for all sums of money paid by it in respect to surveying the land, correcting the field-notes, paying taxes theron, and in otherwise improving the said land. When the State instituted the suit she subjected herself to the jurisdiction of the court to the same extent as any other litigant, so far as concerned all equitable and all legal defense to her claim, and she can claim equitable relief only when entitled upon principles of equity and good conscience.

Twenty-seventh. The court erred in not reversing said cause and rendering judgment in favor of appellants and in not holding that the governor, in obedience to law, having appointed an engineer to inspect the road, was not the sole and exclusive judge as to whether the facts entitling appellants to certificates for lands in question existed.

The amendment to section six, article 10, of the constitution of 1869-'70 having been adopted and the constitutional restriction, if any, upon the granting of said land having been removed, appellants were entitled at the time the certificates in question 199 were issued to the lands in question for the construction of the road, and the fact of such construction having been ascertained and determined by the executive department of the State in the manner provided by law, the finding and decision thereof in accordance thereto was final and conclusive as to the

time and manner when said work was done and performed and the certificates were earned.

Twenty-eighth. The court erred in not rendering judgment reversing said cause in favor of appellants because it appeared from the special acts incorporating the Houston and Texas Central Railway Company and relating to it, the law granting land to said railway company under and by virtue of the special act, and other laws, both general and special, and from the decision of the supreme court of Texas and the Supreme Court of the United States, and the uniform construction placed upon such laws by the executive department of the government — established a rule of property with respect to such land, and a vested right under such law grew up in favor of appellants, which were violated and taken away by the judgment of the court below, and the construction placed upon said law by said court was contrary to the Constitution of the United States and the amendments thereof.

Twenty-ninth. The court erred in not reversing the judgment of the court below and rendering judgment in favor of appellants because the undisputed evidence showed that in 1870, when the law was passed merging the Washington County road into the Houston and Texas Central Railway Company, the legislature contemplated submitting for the adoption of the people the amendment to section six, article ten, of the constitution of 1869, removing the restriction, if any, upon appellants' right to acquire the land under its original charter and the several acts amendatory thereof and supplemental thereto under the general laws of the State. See *Railway vs. Groos*, 47 Texas, p. 408.

200 Thirtieth. The court erred in not reversing the judgment of the lower court and not rendering the same in favor of appellants, and in fact holding that the constitution of 1869, article ten, section 1, deprived appellants of the sixteen sections of land for each mile of railroad constructed by it granting to the Houston and Texas Central Railway Company and the several acts amendatory and supplemental thereof and the general laws of the State upon the subject theretofore in force. This land, including all that now in controversy, was recovered by the State and judgment affirmed by this court, because the court holds that the constitution of 1869 took away from the defendants the right to acquire further land, and both defendants and the legislature were powerless, the one to grant and the other to receive the land to which it was entitled under all the charter amendments and supplements and general and special laws of the State of Texas granting lands to railroads, and particularly to appellant company, and which action of the court in so holding and in so construing the law impairs the obligation of appellants' contract whereby it was entitled to receive said land grants, and it destroyed appellants' vested right to said land, contrary to section ten of article 1 of the Constitution of the United States.

Thirty-first. The court erred in holding that the Houston and Texas Central Railway Company extended its road from Brenham to Austin between the date of the special act and the 25th day of De-

cember, 1891. This is, of course, the mistake of the typewriter, as the road was finished 25th day of December, 1871. Record, p. —.

The court erred, for the reasons stated, in holding that the lands were located in the "Pacific reservation," because the "Pacific reservation" was created after the file of the railroad, which was made

28th day of July, 1873. Record, p. 105. And further hold-

201 201 ing: "A sort of blanket file seems to have been made or attempted in behalf of the Houston and Texas Central Railway Company by virtue of these certificates on a large body of land, including that in controversy, but without the application of any particular certificates to any particular section of land. Nothing further seems to have been done in pursuance of this file till the locations were made in June of the succeeding year."

The court has committed a grave error in the facts on this point, and appellants request another and more perfect finding of facts upon the point of file. The facts are as follows: The statement of facts on page 104 of the Record shows that defendants also introduced in evidence the file made by the Houston and Texas Central Railway Company upon said lands dated July 26, 1872.

"STATE OF TEXAS,
County of Bexar. }

To the surveyor of Bexar district :

By virtue of futy certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40.5036, inclusive, I hereby file upon the following vacant land in your land district, to wit, on the waters of the Colorados and Clear fork of the Brazos, in Taylor county : Beginning at the southeast corner of John Trussell's $\frac{1}{2}$ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to or Martinez's N. E. corner; thence S. E. with Martinez, C. Colenek, Ed. Taylor, and Jas. Jeffries' E. lines to Davis Harrison; thence northeast and northwest with the lines of Harrison,

202 202 E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, Jas. Walker, Thos. Linsey, and Elisch Isias to the L. Forsyth league and with its N. and N. E. corner to the line of the county; thence east with counter line of Taylor and Runnels to the John Forbes survey; thence north with Forbes, C. M. Jackson, W. F. Sparks, Robert Triplett, and John Kincaid to the N. W. corner of the latter; thence east with Kincaid and Triplett to Smith league and with its W. and N. lines to the N. E. corner of the lines between Bexar and Travis district; thence N. W. with said line to the beginning.

ROBERT M. ELGIN,
Land Agent H. & T. C. Ry Co.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountain pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, p. 131.

C. HARNETT, *D. L. B. D.,*
By L. C. NAVARRO, *Dep.*

I, W. M. Locke, district surveyor Bexar district, dohere by certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pp. 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor Bexar District."

The file was also filed in the general land office of Texas. (See Record, page 106.)

203 The suit is to recover land, the certificate number and survey number of which are as follows:

Certificate No.	Survey No.	Block No.
38/4438.....	169	64
38/4443.....	191	"
40/4997.....	199	"
40/4998.....	201	"
40/4999.....	203	"
40/5001.....	207	"
40/5002.....	209	"
40/5003.....	211	"
40/5004.....	213	"
40/5005.....	215	"
40/5006.....	217	"
40/5019.....	243	"
40/5020.....	245	"
40/5021.....	247	"
40/5022.....	249	"
40/5023.....	251	"

(Rec., p. 2.)

The surveys were located in said file by virtue of certificates numbered from 40/4997 to 40/5036, inclusive. It will thus be seen that survey No. 169 is located by virtue of certificate 38/4438 and is not covered by the file, and survey No. 191 is located by virtue of file No. 38/4443 — is not covered by the file; surveys numbers 169 and 191 only are not embraced in the file, and if the "Pacific reservation" is a valid act these two surveys are affected by it, but all the others are prior to it. The court misapprehends the law in force

which gave parties who made files on land 12 months thereafter in which to survey the lands by virtue of the certificates.

So, then, from the 28th day of July, 1872, the date of the filing (Rec., p. 105), to 7th day of June, A. D. 1873, the date when the lands were surveyed (Record, p. 2), constitutes a period of time less than twelve months. The act creating the "Pacific reservation" was passed May 2, 1873, but was not approved by the governor. It was passed while the file above referred to was in existence and had not expired.

204 The findings of fact and conclusions of law were filed by the district judge who tried the cause without any request of the parties; that the same was not full enough to be considered as the material facts, and the parties filed an agreed statement of facts as provided by law. (See Record, pp. 79 to 134, inclusive.) The court cannot rely wholly on the findings of fact below, as there was no finding whatever that appellants had a file, and appellants request the court to find additional facts, and especially to set out in the finding appellants' file on pages 104, 105.

Thirty-second. The court erred in holding in effect that the constitution of 1869 (article 10, section 6) stands in the way of any grants of land to railroads when the act of August 15, 1870, which authorized the extension of the old Washington County road from Brenham to Austin, was passed, "for if the effect of same was to repeal land grants to the Houston and Texas Central Railway Company, then the same impaired the obligation of appellants' contract right to acquire sixteen sections of six hundred and forty acres of land for each and every mile of road constructed and to be constructed by said railroad company."

By virtue of the act entitled "An act supplemental to the acts to establish the Galveston and Red River Railway Company," approved February 7, 1853, the said railway company was authorized "to build a branch thereof towards the city of Austin under the same restrictions and stipulation provided in said original act," and etc.

The act approved September 1, 1856, granted to said company "the rights, benefits, and privileges granted by an act approved January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands.'" This act further provided "that said company shall be required to complete the main trunk of said road to the 32 degree of north latitude or until 205 they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road."

Section five of said act required the railroad in accepting the benefits of said act to "take all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red river contemplated in its charter," etc.

The act of September 21, 1866, entitled "An act granting lands

to the Houston and Texas Central Railway Company," granted to it "sixteen sections of land of 640 acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said railway company."

The State having contracted with said railway company to grant it land for every mile of road it has constructed or may construct, it was error to hold that the same was cut off by virtue of the constitution of 1869 (article 10, section 6) or to hold that the act of 1870, merging into the Houston and Texas Central Railway Company the Washington County railroad, which began at Hempstead, a point on the main trunk line of the Houston and Texas Central Railway Company, and terminated at Brenham, and allowing said latter-named road to construct from Brenham to Austin, was other than to merge said road and relieve the company from beginning its road on the main line, and that it granted no new or greater power than it already possessed to acquire lands by building to Austin, and that by reason of said act of merger of August 16, 1870, the right to acquire the land was not cut off by the constitution of 1869-'70.

206 The road to Austin was completed simultaneously with the main line.

Thirty-third. The court erred in holding that appellants' right to acquire sixteen sections of land to the mile was dependent alone upon the general law passed on that subject in 1854 and extended for ten years in 1866, and that law denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right to receive any grant of land for any branch road, because, as already shown, the said railway company had a charter right to build to Austin and an independent right to "sixteen sections of land of six hundred and forty acres of land each for every mile of road it has constructed or may construct and put in running order." Neither the act of January 23, 1856, nor the act of September 21, 1866, nor any other law limited the right of the Houston and Texas Central Railway Company to acquire land alone to the main line of road.

Thirty-fourth. The appellants further claim that this court has committed an error in affirming this case, because the rights of the Houston and Texas Central Railway Company to acquire land for the construction of its railway was granted by laws prior to 1869 and 1870, and the right to acquire the same was under laws in existence long after the entire railway was completed. By virtue of the charter of the said company and its amendments by the legislature there was no restriction in respect to the right of the company to acquire land for building to Austin; hence in holding that the constitution of 1870 prohibited the legislature from passing the law of August 15, 1870, impairs the obligation of appellants to acquire land under its charter contract and is repugnant to the Constitution of the United States; and the said constitution of 1869 and 1870,

207 so far as the same prohibited the legislature from granting any rights to it to acquire land by virtue of its prior rights, is unconstitutional, null, and void, the object of the consti-

tution of 1869-'70 being to prohibit future grants to railroads, but not intended to apply to those already organized and constructing railways under prior legislation.

Thirty-fifth. This court erred in not considering and in not sustaining appellants' twenty-third assignment of error, to the effect that the suit was instituted against the property of the Houston and Texas Central Railway Company while it and all its properties were in the hands of a receiver appointed by the United States circuit court, who was then in possession of the property, and that the suit was brought in violation of the comity existing between courts of concurrent jurisdiction without asking the permission of the court in possession of said property and the court appointing the receiver and the court where the receivership is pending for the authority to sue for the property which was by law in the possession of the receiver; and, further, because the evidence having shown that said property being in the possession of the receiver under and by virtue of the orders and decrees of said United States court the law required the suit to be brought against the party in possession, who was Charles Dillingham, receiver as aforesaid.

Thirty-sixth. For all the reasons given and for the various grounds specified, both in this motion and in the assignments of error, the court below erred in not finding against the State and in not giving judgment for appellants for the land sued for, and this court, for the same reasons as herein shown, erred in not reversing the judgment and rendering the same for appellants.

Thirty-seventh. The court erred in not holding that appellants were entitled to the land grant by virtue of its charter rights and laws, general and special, passed prior to the adoption of 208 the constitution of 1869-'70, and in not holding that, in so far as the constitution of 1869-'70 interfered with the right of appellants to the land grant, the same was unconstitutional, null, and void.

That the first section of the act of August 15, 1870, entitled "An act for the relief of the Houston and Texas Central Railway Company," provided "that the Washington County railroad is hereby declared to be, to all intents and purposes in law, a part of the Houston and Texas Central railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway, and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County railroad from the town of Brenham, in the county of Washington, to the city of Austin," &c.

It was further provided in said act "the said Houston and Texas Central Railway Company," by reason of the construction of the said railway from the town of Brenham to the city of Austin and by reason of the construction of the said branch from Navarro county to Red river, shall have and enjoy all the rights, privileges, grants, and benefits that are now or may at any time hereafter be secured to any railroad company in the State of Texas by any general law of the State," &c.

Section four thereof provided "no forfeiture of any of the rights or privileges secured to it by any existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to the construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company,' but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had in all respects — compiled with."

The act of 1870 gave the right to acquire the Washington County road and to build from Brenham to Austin instead of from some point on the main line. It did not alter or repeal the charter right entitled "An act supplemental to the acts to establish the Galveston and Red River Railway Company," approved February 7, 1853, authorizing the railway company to build to Austin from the main line.

It relieved the railway of the restriction contained in section one of the act approved September 1st, 1856, which required the road "to complete the main trunk of said road to the thirty-second degree of north latitude or until they shall connect with some road reaching to or in the vicinity of Red river before they shall commence any branch road."

It continued in full force and effect "all the rights and privileges secured to it by the existing laws."

Hence the right to acquire the land being a charter right the right to the lands sued for could not be divested by the construction placed upon the constitution of 1869-'70 without impairing the obligation of appellants' contract right, and the court erred in holding that the power to acquire land for "building the road to Austin was withheld by the clause (article ten, section 6, of 1869) of the constitution referred to;" and further erred in holding *that* the right of the said railway "to have sixteen sections of land to the mile for so building it under the general law on that subject as passed in 1854 and extended for ten years in 1866," for the right of appellants, as shown, is predicated, not only upon the general laws on the subject, but also upon its charter rights, amendments, and supplements thereto, all in full force and effect at the date of the adoption of said constitution of 1869-'70.

Wherefore appellants pray the court to set aside its said judgment herein affirming the judgment of the court below and to grant it a rehearing.

Appellants represent that the Hon. M. M. Crane is the attorney general of the State of Texas and represents the appellee in said cause; that the said attorney general now resides and has his office in the city of Austin, county of Travis, and is attorney for appellee

The State of Texas; and appellant further prays for service of this motion to be made upon him as the law requires.

BAKER, BOTTS, BAKER & LOVETT,

AND T. D. COBBS,

Attorneys for Appellants.

Filed in court of civil appeals May 23, 1896.

Motion for Additional Findings of Fact.

In the Court of Civil Appeals for the 2nd Judicial District, at Fort Worth, Texas.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appelleants,
v.s.
 THE STATE OF TEXAS, Appellee.

And now comes the appellants, by their attorney, and asks the court to make additional findings of fact as follows:

1st. That the appellants had a file made upon said land as follows:

STATE OF TEXAS, }
County of Bexar, }

To the surveyor of Bexar district:

By virtue of fu-ty certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 404997 to 405036, inclusive, I hereby file upon the following vacant land in your land district, to wit: On the waters of the Colorados and Clear fork of the Brazos, in Taylor county: Beginning at the S. E. cor. of John Trussell's $\frac{1}{2}$ league, near the Clear fork of the Brazos and on the line of Travis district, thence west to Trussell's S. W. corner; thence northerly with his line, passing his N. W. corner, and continuing to the Clear fork; thence with the Clear fork and the line of Young district to the W. line of the county; thence south to or opposite to the M. C. Lunicki sur.; thence eastward to and with Lunicki to or Martinez's N. E. corner; thence S. E. with Martinez's, C. Colenck, Ed. Taylor, and James Jeffries' E. lines to David Harrison; thence northeast and northwest with the lines of Harrison, E. Isias, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry to the N. E. corner of said Henry's league; thence S. E. and S. W. with Henry, James Walker, Thos. Linsey, and Elisich Isias to the L. Forsyth league, and with its N. and N. E. line to the line of the county; thence E. with county line of Taylor and Runnels to the John Forbes survey; thence north with Forbes, C. M. Jackson, W. F. Sparks, Rob't Triplett, and John Kincaide to N. E. corner of the latter; thence east with Kincaide and Triplett to Smith league,

and with its W. and N. lines to the N. E. corner on the line between Bexar and Travis district; thence N. W. with said line to the beginning.

ROB'T M. ELGIN,
Land Agent H. and T. C. Railway.

All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of mountains pass.

ROB'T M. ELGIN, *Land Ag't.*

Came to hand and filed in my office at 11 o'clock a. m. this 28th day of July, A. D. 1872, in File Book No. 4, page 131.

C. HARNETT, *D. L. B. D.,*
By L. C. NAVARRO, *Dep.*

212 I, W. M. Lock, surveyor Bexar district, do hereby certify that the foregoing is a true and correct copy of the original on record in my office in File Book No. 4, pages 130 and 131.

Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890.

W. M. LOCKE,
District Surveyor, Bexar District.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, March 24th, 1892.

I, W. L. McGaughay, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, with endorsements thereon, now on file in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the date last above written.

[SEAL.]

W. L. McGAUGHEY,
Com'r G'l L'd Office.

Rec., p. 104-'5.

Also the map showing file delineated thereon. Rec., p. 134.

2nd. That the parties agreed "that all special acts of the legislature of the State of Texas, all railroad charters and amendments thereto bearing upon the subject-matter of this litigation may be considered in evidence without introducing the same." See Rec., p. 80.

3rd. That the land-scrip certificates included in the suit, and the land located by virtue thereof, were issued for that portion of the road constructed between Brenham and Austin. Rec., p. 79.

4th. Also show the roads that got lands and sidings under the construction of the executive department. Rec., p. 109.

213 5th. That the lands were continued in the hands of Chas. Dillingham, receiver, first, by order of the United States circuit court, Rec., p. 125, and then further continued in his possession by an order of Associate Justice Lamar as follows:

18—406

United States Circuit Court, Eastern District of Texas.

STEPHEN W. CAREY *et al.*, Appellants,

vs.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al.*, Appellees.

It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings, as herein directed, pending the hearing and decision of the said appeals:

Now, therefore, on motion of R. H. Landale, solicitor for complainants—

It is ordered that pending the hearing and decision of the said appeals taken by the complainants to the Supreme Court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the receiver of the Houston and Texas Central railway, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central railway or any of the line of railway formerly operated by the Houston and Texas Central Railway Company and of which he is now possessed, as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them to apply to me to vacate the said stay if 214 the said appellant fail to prosecute the said appeals with due diligence.

Dated Washington, December 9th, 1892.

L. Q. C. LAMAR,
*Associate Justice of the Supreme Court of the
United States, Assigned to the 5th Circuit.*

6th. That the governor of Texas construed the law as entitling the said railway as being entitled to the specific land grant, and held in a letter to the commissioner of the general land office on the subject, among other things, as follows: "I am of the opinion that the decision of the supreme court in the H. & G. N. R. R. case covers substantially the abstract right of the former railway, and I am not prepared to say that this company should be required to commence suit to enforce that right." See Rec., p. 131.

As appellants regard the foregoing facts to be material for the court to consider to a proper decision of the case, — do most respectfully request the court to find the same in addition to the other facts in the case.

Respectfully submitted.

BAKER, BOTTS, BAKER & LOVETT AND
T. D. COBBS, *Att'ys for Appellants.*

Filed in court of civil appeals May 23, 1896.

Opinion on Motions.

HOUSTON & TEXAS CENTRAL RAILWAY Co. *et al.*, }
 Appellants,
 vs.
 THE STATE OF TEXAS, Appellee. } No. 1881/1525.

On motion for rehearing.

This motion seems to concede that the act of 1870 gave
 215 appellant company's right to build a branch of its road from
 Brenham instead of from some point on the main line to
 Austin, and that it relieved said company of the restriction con-
 tained in prior legislation, which required it "to complete the main
 trunk of said road to the thirty-second degree of north latitude or
 until they shall connect with some road reaching to or in the vicin-
 ity of the Red river before they shall commence any branch road."

From this it would seem to follow that appellant must derive its
 right to acquire the certificates in question, in part at least, from
 the act of 1870, which was passed at a time when the legislature
 had no power to confer such rights. We are therefore strengthened
 in the conclusion heretofore announced—that these certificates were
 invalid—and hence overrule the motion for rehearing.

The motion (No. 1882) for additional findings, though founded
 in the usual misconception of the duty of this court in that respect,
 is granted, and the matters therein copied from the record, which
 we are requested to incorporate in our findings, we approve and
 adopt as correct statements, but they need not be again copied
 by us.

STEPHENS,
Associate Justice.

Filed July 3, 1896.

Order on Motion for Rehearing.

H. & T. C. R'Y Co. *et al.*, }
 vs.
 THE STATE OF TEXAS. } 1875/1525.

JULY 3, 1896.

This day came on to be heard the motion of appellant for a re-
 hearing in this cause, which, having been heard and considered by
 the court, is overruled.

216 *Order on Amended Motion for Rehearing.*

THE H. & T. C. R'Y Co. *et al.*, }
 vs.
 THE STATE OF TEXAS. } 1881/1525.

JULY 3, 1896.

This day came on to be heard the amended motion of appellants
 for a rehearing in this cause, which, having been heard and con-
 sidered by the court, is overruled.

Order on Motion for Additional Conclusions.

THE H. & T. C. R'Y Co. et al. }
 vs. } 1882/1525.
 THE STATE OF TEXAS. }

JULY 3, 1896.

This day came on to be heard the motion of appellants asking the court to file additional conclusions herein, which, having been heard and considered by the court, is granted and the additional conclusions filed. It is further ordered that the clerk of this court make the following change in the opinion filed herein: On page one, 3rd line from the bottom, erase 1891 and insert 1871 in lieu thereof.

Petition for Writ of Error.

In the Supreme Court of Texas.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY and FRED- }
 ERIC P. OLcott
 versus
 THE STATE OF TEXAS. }

Petition for writ of error to the court of civil appeals for the second supreme judicial district.

To the honorable the supreme court of Texas:

Your petitioners, The Houston and Texas Central Railroad Company and Frederic P. Olcott, applying for a writ of error to the court of civil appeals for the second supreme judicial district of Texas for the removal of the above-entitled cause from said court into this honorable court, respectfully represents that this the said cause was instituted on the 3rd day of February, 1890, in the district court in and for Nolan county, Texas, by the attorney general, in the name and behalf of the State of Texas, as plaintiff, against your petitioners (and George E. Downs, who subsequently disclaimed), as defendants, for the recovery of sixteen sections of land of 640 acres each, situated in Nolan county, Texas, and resulted in judgment in the court below, on the 19th day of April, 1892, in favor of the State and against petitioners for all the land sued for and in favor of George E. Downs on his disclaimer, which judgment, on appeal therefrom by petitioners, was in all things affirmed by the said court of civil appeals by a judgment rendered on the 9th day of May, 1896. Motion for rehearing was duly filed in said court by petitioners on the 18th day of May, 1896, and an amended motion for rehearing was also duly filed by petitioners on May 23rd, 1896, both of which motions were by said court overruled on the 3rd day of July, 1896, and petitioners say that in the judgment and proceedings in said cause the said court of civil appeals committed error in its rulings upon questions of law, the

determination of which were necessary to the decision of said cause in the said court of civil appeals, and which are relied upon by petitioners as grounds for their application for writ of error herein as follows, to wit:

First.

Jurisdiction of Subject-matter.

The said court of civil appeals erred in overruling and holding not well taken petitioners' first and sixth assignments of error, 218 which complained of the action and ruling of the court below in overruling and denying petitioners' plea to the jurisdiction of said court, based upon the ground, in effect, that all the land sued for was at the time in the custody and possession of the circuit court of the United States in and for the eastern district of Texas, at Galveston, in consolidated cause No. 198, on the equity docket of said court, entitled "Nelson S. Easton and James Rintoul, trustees, and The Farmers' Loan and Trust Company, trustee, v. The Houston and Texas Central Railway Company *et al.*," through Charles Dillingham, the receiver of said circuit court in said cause, and in holding that notwithstanding such fact the court below had jurisdiction of this cause.

Statement.

See petitioners' plea (Trans., 11-16), decrees of the said circuit court introduced in evidence in support thereof (Trans., 124-127), and the judgment of the court below overruling and denying said plea (Trans., 5-9). See also Petitioners' Brief, pp. 4, 10; first and sixth grounds of the motion and amended motion for rehearing.

Authorities.

- Ellis *v.* Water Co., 86 Tex., 109.
- Russell *v.* T. & P. R. Co., 68 Tex., 646.
- Brown, receiver, *v.* Brown, 71 Tex., 355.
- Edwards *v.* Norton, 55 Tex., 410.
- Wiswall *v.* Sampson, 14 How., 52, 65.
- 2 Daniel's Chanc., 1057, 1058.
- Angel *v.* Smith, 9 Vesey, 335.
- Brook *v.* Greathead, 1 J. & W., 176.

Second.

Necessity for Receiver as Party.

The said court of civil appeals erred in overruling and holding not well taken petitioners' second assignment of error, complaining, in effect, of the action and ruling of the court below in overruling and denying and holding not well taken petitioners' plea in 219 abatement, based upon the ground, in effect, that Charles Dillingham, the receiver of the circuit court of the United States in and for the eastern district of Texas, was a necessary and

proper party, because all the property sued for was in his custody and possession as such receiver.

Statement.

See petitioners' plea (Trans., 16, 17), the evidence offered in support thereof (Trans., 124-126), and the judgment of the court overruling and denying the same (Trans., 59). See also Petitioners' Brief (p. 6) and the second ground of the motion and amended motion for rehearing filed in the court of civil appeals.

Authorities.

- Rev. Stat. 1895, art. 1208, 5254.
Ship Channel Co. v. Brewly, 45 Tex., 6.
De La Vega v. League, 64 Tex., 205, 212.
Halloway v. McIlhenny, 77 Texas, 657.

Third.

OVERRULING GENERAL DEMURRER.

The said court of civil appeals erred in overruling and holding not well taken petitioners' third assignment of error, complaining of the action of the court below in overruling petitioners' general demurrer to plaintiff's petition.

Statement.

See plaintiff's original petition (Trans., 1-7), petitioners' general demurrer (Trans., 17), and the judgment of the court overruling the same (Trans., 59). The petition described the land sued for (Trans., 2), and showed that certificates had been duly issued therefor and located. It alleged (Trans., 3) that they were issued upon and for the construction of that portion of the road extending from Brenham to Austin, which it was alleged was "constructed, completed, and in running order on or about February 21st, 1872." It also alleged that at the time of the construction and completion of said road and at the time when said certificates were issued there was no law, general or special, authorizing or permitting their issuance, and that the commissioner of the general land office in issuing the same and in permitting them to be located acted without authority of law and in plain violation of the constitution and laws of the State; and also alleged (Trans., 5) that they were located upon lands reserved by the act of May, 1873, relating to the Texas and Pacific Railway Company. See also Petitioners' Brief, p. 67, and the third ground of their motion and amended motion for rehearing.

Argument.

By the allegation as to the issuance and location of the certificates the petition showed title to the land sued for in petitioner railway company. The only matter alleged in avoidance of or to defeat such

title were the general averments to the effect that there was at the time no law, general or special, authorizing the issuance of the certificates or their location on the land in question, and that the commissioner of the general land office acted without authority of law. These were merely conclusions of the pleader. According to the most familiar principles of pleading, he should have alleged, not merely his conclusions, but the facts upon which he relied to defeat or avoid the title which his petition showed had passed to defendant. Opposed to the mere conclusions of the pleader is the presumption of law, always indulged in favor of the regularity and validity of official acts, that the commissioner of the general land office acted in obedience to the law in issuing the certificates, and that they

were legally located. Furthermore, there were a number 221 of laws, as the court judicially knows, under which the certificates might have been legally issued. There was the special act of February 14th, 1852, amending the act of incorporation of the Galveston and Red River Railway Company and granting it eight sections of land of 640 acres each for every mile of road that it should construct; the general act of January 30th, 1854, granting lands to encourage the construction of railroads; various general and special rates relating to the Houston and Texas Central railway; the act of September 21st, 1866, granting lands to the company for all road constructed by it; the general act of November 13th, 1866, granting lands to encourage the construction of railroads and continuing in force for ten years from that date; the general act of January 30th, 1854, and other acts which need not be specifically referred to here. No one will deny that the company was entitled to the certificates in question under the special act of September 21st, 1866, if it constructed its road within the time therein specified. Whether it did so or not was a question of fact for the governor to determine in the manner provided by law, and the petition nowhere alleges that the governor had not determined such fact or had determined it incorrectly, if that could be claimed. Indeed, no fact was alleged to show that the certificates were invalid or that the power of the commissioner of the general land office to issue certificates was illegally exercised with respect to them. Ordinarily the plaintiff in an action of trespass to try title may not be required, perhaps, to allege the title or claim of the defendant, but may content himself with the allegations required by Rev. Stat., art. 5250. It is to be observed, however, that in this case the plaintiff's petition shows title in defendants, and, that being true, it certainly devolved upon the plaintiff to show by appropriate aver-

222 ments the facts upon which it relied to avoid or overcome such title, and this it did not do. We submit, furthermore, that in an action of this character, where the State is seeking to recover lands granted by it and for which certificates have been issued by the executive officers charged by law with that duty and power, and which have been located in the manner provided by law and recognized by the executive officers as valid, it devolves upon the State to do more than is required by art. 5250 in reference to ordinary actions of trespass to try title. The relief is essentially

equitable in its nature, and the State should allege the facts on which it seeks to cancel its acts and relies for the relief prayed. It may not be required in the form or with the strictness observed in bills in equity in chancery courts, but it should at least be "a statement in logical and legal form of the facts constituting the plaintiff's cause of action," as required in all cases by R. S., art. 1183, but under the loosest rules of pleading the petition in this case certainly seems to be insufficient. Nothing short of a clear and specific statement of the facts relied upon to overcome and defeat the defendants' title would suffice. We here invite the court's attention to what was said by the Supreme Court of the United States in Maxwell Land Grant case, 121 U. S., 381, 382. While that case was a proceeding in equity on the chancery docket of the court, the principle is precisely the same, and no one will contend that the facts necessary to a recovery in this case or in any case under our blended system of practice should be less than are required in that case, and, being necessary, it devolved upon the State to allege as well as to prove them.

Neither was the defect in plaintiff's original petition cured or removed by the averments of the supplemental petition (Trans., 8, 9), even if these facts would have been sufficient if incorporated in the original petition, because the defective statement of a cause of action in an original petition can be cured only by an amendment and not by a supplemental petition. (District court rules 12-15; *Crescent Ins. Co. v. Camp*, 64 Tex., 521.)

Fourth.

Authority of Attorney General.

The said court of civil appeals erred in overruling and holding not well taken petitioners' fourth assignment of error, complaining, in effect, of the action of the court below in overruling defendants' exception to plaintiff's petition, based upon the ground substantially that it failed to show that the attorney general was authorized or directed to institute this suit or authorized to maintain the same.

Statement.

The suit was instituted by the attorney general, and the only allegation of the petition touching his authority or power is in the opening paragraph as follows: "The State of Texas, hereinafter styled plaintiff, comes now, by its attorney general, J. S. Hogg, who acts by lawful authority of law herein, complaining," etc. Defendants specially excepted to plaintiff's petition because it did not show the attorney general had authority either under any law of the State or by direction of the governor to institute the suit and prayed that such authority be required to be shown (special exception No. 4, Trans., 18), and this exception was by the court overruled (Trans., 59). The record fails to show that any evidence whatever of such authority was offered. (See also Petitioners' Brief, page 8,

and the fourth ground of the motion and amended motion for re-hearing.)

Authorities.

Constitution 1876, art. IV, sec. 32.

Rev. Stat. 1895, art. 2907.

State v. Moore, 57 Tex., 307.

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Argument.

The office of attorney general is created by article IV, section 22, of the constitution of 1876. The constitution makes it his duty to inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any such corporation from exercising any power or demanding or collecting any species of taxes, toll, freight, or wharfage not authorized by law, and whenever sufficient cause exists to seek a judicial forfeiture of such charters unless otherwise expressly directed by law, etc. Such proceedings he may take, perhaps, without the direction of the governor, but nowhere does the constitution confer upon him power to institute or maintain in the name of the State, at his mere will and pleasure, suits against citizens, and for any cause or purpose that may satisfy his whim or pleasure, except those above specified. The governor is, under the constitution, the chief executive officer of the State, and the attorney general should not be allowed to usurp his prerogatives. The State may waive the right or action or forbear at pleasure. Whether it will do so is, as a rule, a question for the legislature to determine. If the legislature has not acted, then, if it is a matter pertaining to executive action, the right to act is vested in the governor unless otherwise bestowed by the constitution or by statute. Unless precedents set up by the attorney general himself in recent years, and as yet without sanction by this court, have changed what might otherwise be reasonably assumed to be fundamental law, the attorney general, by virtue of his office, has no right or power to represent or act for the State and exercise its sovereign functions and prerogatives unless expressly or by clear implication authorized so to do by the constitution or statutes of the State. We have seen that, outside of representing the 225 State in the suits to which it is a party in the appellate courts, the only suits the attorney general is by the constitution authorized to institute and maintain are actions to prevent private corporations from exercising power and exacting charges not authorized by law and for the forfeiture of the charter of such corporations where sufficient cause therefor may exist. When we turn to the statutes we find that wherever the legislature has deemed it proper for the attorney general to institute suit in behalf of the State it has conferred upon his specific authority in that behalf. It has authorized him to institute suit to escheat land unlawfully held by aliens (Rev. Stat. 1895, art. 14); to inspect the accounts of certain officers and institute suit for the recovery of funds in their

hands (art. 2892); to institute suits against corporations for exercising power or exacting charges not authorized by law (art. 2901); to proceed by *quo warranto* against those holding offices or exercising franchises to which they are not entitled by law (art. 4343); to proceed against railway companies for failure to maintain offices in this State (art. 4369) and for failure to make reports, etc. (art. 4375); to proceed at the instance of the railroad commission, by suit, for the recovery of all penalties prescribed by the act creating the railroad commission (art. 4579), etc.; but nowhere has the legislature conferred upon him general power to exercise at will the sovereign right of the State to institute and maintain suits. It has specified particularly, and often with restrictions and limitations (art. 14, 4568), cases in which he may proceed without instructions from the governor by suit in behalf of the State. The general power the legislature not only withheld from the attorney general, but expressly conferred upon the governor by R. S., art. 2907, which reads as follows:

“The governor is hereby authorized to order, through the proper officials, the institution, prosecution, or defense of any civil action or suit whenever he deems such course proper for the assertion or defense of any right of the State, and to render to said officials such assistance as to him may be necessary or expedient.”

It is a fact of some significance that this article is embraced in the chapter of the Revised Statutes relating to the powers and duties of the attorney general. If this article had been omitted from the statute, still the attorney general would be without power to institute this suit, because it is, as we said before, a sovereign power, belonging, in the first instance, to the legislature, and devolving, in the next instance, upon the governor as the chief executive officer of the State; but, existing as it does, it is an express denial of the power to the attorney general and evinces the purpose of the law-making power to vest it in the governor, where it properly and ordinarily belongs.

The power of the attorney general seems to be that of regulating and keeping within the bounds of the law the matters entrusted to him by the law; but we fail to find an instance in the law where he is authorized, at his will or pleasure, to institute proceedings to set aside the solemn act of the State already done upon the report of its own officers. To warrant him in so doing he must have express authority by general law or special authority in the particular case. Otherwise all acts of the State are subject to his inquiry at his will or pleasure.

We submit, therefore, with confidence that it was necessary for the attorney general to show that he had been ordered by the governor to institute this action, and that without such order he has no more power than any other citizen to proceed by an action in the name of the State. He neither alleged, produced, or proved such order in any way, but assumed the authority by virtue of his office or of some law to which no one refers and which we assert does not exist. If there is an exception conferring upon

the attorney general the power to institute and maintain an action of this character to the general rule conferring the discretion upon the governor by the statute above quoted, it must be found in some express provision of the statute or constitution, and no such provision exists. The action of the attorney general, therefore, in this case is as much in excess of his lawful power and beyond the authority of the law as he claims the action of the commissioner of the general land office to have been, and is an usurpation of power conferred upon the governor and an effort to exercise a power of the State never granted to him by law.

Fifth.

Validity of File.

The said court of civil appeals erred in overruling and holding not well taken petitioners' fifth assignment of error, complaining, in effect, of the action of the court below in not finding and holding that the file made by petitioner railway company on July 28th, 1872, upon the land in question was superior to and unaffected by the reservation sought to be made in favor of the Texas and Pacific Railway Company by the special act of May 2d, 1873, and that said file was valid, notwithstanding said special act.

Statement.

See Petitioners' Brief, pages 8, 9, and the fifth and thirty-first ground of the motion and amended motion for rehearing; see the file made through R. M. Elgin on the 28th day of July, 1872 (Trans., 104-106); see also the map in the general land office showing all the lands involved in this suit (except two sections) 228 embraced in the boundaries thereof (Trans., 134). The special act assuming to make the reservation in favor of the Texas and Pacific Railway Company was passed May 2, 1873, but was not approved by the governor. (Special Laws 1873, pages 318-327.)

Authorities.

Chap. CVIII, Special Laws 1873, 318, section 5 of which expressly preserved existing rights of third persons.

Sayles' Civil Statutes, art. 3897, providing that such entry or application shall confer a preference right of location or survey over any subsequent entry or application, and art. 3902 (act of February 10, 1852), allowing twelve months after entry within which to have the land surveyed.

That the right of the owner of a certificate attaches at the date of his file see—

Montel v. Speed, 53 Tex., 339.

Hamilton v. Avery, 20 Tex., 635.

Sherwood v. Fleming, 25 Tex. Sup., 408.

Milam County v. Bateman, 54 Tex., 163.

Gullett v. O'Connor, 54 Tex., 408.

Sixth.

General and Special Laws Relating to Railway Company.

The said court of civil appeals erred in overruling and holding not well taken petitioners' seventeenth assignment of error, which in effect complained of the action of the court below in rendering judgment against petitioners and in holding that petitioner railway company was not entitled to the land grant in question under the general law of January 30th, 1854, granting lands to encourage the construction of railroads, and the laws of 1862 and 1866 and the special law specifically extending the benefits of the general law of January 30th, 1854, to petitioner railway company for the construction of its road to Austin, and also in not holding that by analogy to the constitutional provisions suspending the statutes of limitation the time for construction was suspended till March 30, 1870.

The Houston and Texas Central Railway Company was originally incorporated under the name of the "Galveston and Red River Railway Company," with authority to construct a railway from a point on Galveston bay or its contiguous waters to a point on Red river, by the special act of March 11th, 1848 (Special Laws 1848, chap. 204, pages 370-373). No lands were granted by that act. The next act relating to said railway company was a special act approved February 14th, 1852 (Special Laws 1852, chap. 148, pages 142-147). By section 14 of this act eight sections of land of 640 acres each for every mile of railway it should construct was granted to the company, and regulations were prescribed with reference to the location of the land and the construction and operation of the company's railway. By the special act of February 7th, 1853 (Special Laws 1853, chap. 19, page 36), the action of the incorporators in commencing the survey and grade of said company's railway at the city of Houston was approved and confirmed. Section 2 of that act authorized and empowered the company "to extend said railway to the city of Galveston, and also to make and construct, simultaneously with the main railway described in the original acts establishing said company, a branch thereof towards the city of Austin under the same restrictions and stipulations provided in said original acts, etc." By the special act approved January 23d, 1856 (Special Laws 1856, chap. 20, pages 28-30), the "rights, benefits, and privileges of the general law of January 30th, 1854, granting lands to encourage the construction of railroads," was extended to said company upon the conditions (1) that it should construct twenty-five miles of road each year after January 30th, 1856; (2) that it should keep its principal office on its line of road, with all books, papers, and accounts, subject to the inspection of any stockholder; (3) that a majority of the directors should reside in the State, and all elections of directors and other officers should be held in the State; (4) that the company

should complete its main trunk road to the 32nd degree of north latitude or a connection with some road reaching to or in the vicinity of Red river before it should commence any branch road; (5) that the company should be subject to the general acts of February 7th, 1853, establishing regulations for the government of railway companies, and (6) that upon application by it for the benefits of said act of January 30th, 1854, it should prove to the satisfaction of the governor that it had established and kept its principal office on its line of road. This act also (see. 4) authorized the company to mortgage all its property, and after location and survey or patent to mortgage the lands granted to it. Section 5 required it to yield "all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, etc." Section 6 provided that "nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854, entitled An act to encourage the construction of railroads in Texas by donations of land, provided that the right to lands acquired before said repeal or modification shall in all cases be protected." By the special act of September 1st, 1856 (Special Laws 1856, pp. 259, 260), the name of the company was changed to the "Houston and Texas Central Railway Company," and it was given further time to construct certain sections of its road. By the special act of February 4th, 1858 (Special Laws 1858, chap. 86, pp. 94, 95), the company was authorized to extend its road beyond the limits of the State into the Indian Territory and the Territory of Kansas, and by section 2 of said act it was also provided as follows:

"That the failure of the Houston and Texas Central Rail-
231 way Company to complete the third section of twenty-five miles of its road by the 30th day of July, 1858, shall not work a discontinuation as to the said company of the benefits of the act to encourage the construction of railroads in Texas by the donation of land or any other general laws in reference to railroads if said company shall complete said third section by the 30th day of July, 1859, and that on the completion of subsequent sections of twenty-five miles annually after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile, contemplated in said last-mentioned act, for each section so completed, and whenever a failure shall occur on the part of said company to complete a section within the time required, then the land applicable to that section only shall be forfeited and the completion of future sections within the time contemplated by law shall entitle the company to the benefits of said last-mentioned act as fully as if no failure had been made in completing any former section, except as to the section on which the failure occurred, provided that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force."

By two general acts approved January 11th, 1862, it was provided that the failure of any railway company to complete any section or fraction of section of its road, as required by then existing laws, should not operate as a forfeiture of its charter or of the lands to

which it would be entitled, provided it should complete such section or fraction of section within two years after the close of the war (Gen. Laws 9th Leg., 1st ses., chap. 62, pages 43, 44, and chap. 69, pages 46, 47). By both of said acts it was provided as follows:

“The president and directors of the Houston and Texas Central Railroad Company shall before the provisions of this act 232 shall extend to the benefits of said company pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for their stock—to all the rights, privileges, and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others, and shall forward to the governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act: Provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock on or before the expiration of the extension of time provided in this act for the fulfillment of the charter obligations of said company to the State, then and in that case said stockholders shall forfeit all their rights, privileges, and property interests as stockholders in said road.”

The proof showed (Trans., 128, 129) that the directors of said railway company passed the resolution required by the act, restoring the stockholders in the company before the sale of the property to their privileges as such, and the court below found as a fact that the resolution required by the act had been passed. (Sixth finding of fact, Trans., 52; 3rd conclusion of law, Trans., 57.)

By the general law of November 13th, 1866 (Gen. Laws 1866, chap. 174, p. 212) the grant of sixteen sections of land to the mile to railroad companies theretofore or thereafter constructing railroads was extended, under the same restrictions and limitations theretofore provided by law, for ten years after the passage of that act, and it was provided in section 4 of said act “that all tap roads over twenty-five miles long shall be entitled to the benefits of this act.”

233 The special act approved September 21st, 1866 (Special Laws 1866, chap. 11, pages 33, 34), provided that said company should receive from the State a grant of sixteen sections of land of 640 acres each for every mile of road it had constructed or might construct and put in running order “in accordance with the provisions of the charter of said railroad company,” less the land theretofore received by the company under the general law of January 30th, 1854; and provided that said company should construct and put in running order a section of twenty-five miles of additional road to that then built within one year from January 1st, 1867, or fifty miles within two years from that date, and should complete its road to Bryan station by September 1st, 1867. By the special act of August 15th, 1870 (Special Laws 1870, chap. 148, pages 325–328), section 4, the State waived forfeiture of any of the rights or privileges secured to the company by failure to comply

with the conditions of the special act of September 21st, 1866, as to construction, and provided that the company should have and enjoy all the rights and privileges secured to it by existing laws, the same as if such conditions had been in all respects complied with.

Article XII, section 43, of the constitution of 1869 reads as follows:

"The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this constitution by the United States Congress."

Authorities.

Act March 11, 1848, Special Laws 1848, p. 370.

Act February 14, 1852, Special Laws 1852, p. 142.

Act February 7, 1853, Special Laws 1853, p. 36.

Act January 30, 1854, Gen. Laws 1854, p. 11.

Act January 23, 1856, Special Laws 1856, p. 28.

Act September 1, 1856, Special Laws 1856, p. 259.

234 Act February 8, 1861, Special Laws 1861, p. 11.

Acts January 11, 1862, Gen. Laws 1862, pp. 43 and 46.

Acts September 21, 1866, Gen. Laws 1866, p. 33.

Act November 13, 1866, Gen. Laws 1866, p. 212.

Acts August 15, 1870, Special Laws 1870, p. 325.

Constitution 1869, art. XII, sec. 43.

Quinlan v. H. & T. C. R'y Co., 34 S. W. Rep., 738.

Argument.

The company, having been chartered before the enactment of the general law of January 30th, 1854, was entitled to the benefits conferred by that act. Further legislation was not required to enable it to enjoy those benefits. By section 2 of its original act of incorporation the company was granted "the privilege of making, owning, and maintaining such branches to the railway as they may deem expedient." Under that act the company had the right to project branches almost at will, and might have extended to Austin. But it may be said that section 12 of the general act of January 30th, 1854, provided that any company then entitled by law as this was to receive a grant of eight sections of land per mile, accepting the provisions of the act, should not be entitled to receive any grant of land for any branch road, and it may be argued therefrom that the company was under that act only entitled to receive sixteen sections of land per mile for the construction of its main line to Red river. We find, however, that by the special act of February 7th, 1853, the company was expressly authorized "to make and construct simultaneously with the main railway described in the original acts establishing said company a branch thereof towards the city of Austin under the same restrictions and stipulations provided in said original acts," and that by the special act of January 23d, 1856, the legislature expressly conferred upon the company the

rights, benefits, and privileges granted by an act approved January 30th, 1854, entitled "An act to encourage the construction of railroads in Texas by donations of land," in consideration of which the company was required to yield several important rights or privileges assumed to be possessed by it, and by section 5 was required to "yield all branching privileges, except such as are expressly granted by the provisions of its charter to certain points," etc. The right to construct to Austin had been already granted, as we have seen, by the special act of February 7th, 1853, and all other branching privileges were required to be surrendered. The right to construct to Austin had become a part of its franchises. That road was a part of the line which it was authorized to construct. Now, we submit that the purpose and effect of the act of January 23rd, 1856, was to confer upon the company the land grant for all road the company was authorized to construct. There could be no other object in expressly applying the benefits of the act of January 30th, 1854, to the company. It was already entitled, as we have seen, to the benefits of that act for the construction of its main line at least. Why, therefore, extend the act to it unless it was for the purpose of conferring the right to the land grant for the construction of the Austin line, which the company had been authorized expressly to construct by the act of February 7th, 1853? It was to confer the additional privilege or franchise upon the company, and the grant was not without consideration. The company had to bind itself (1) to maintain its principal office and keep its records on its line of road; (2) that a majority of its directors should reside in the State, and its meetings for election of directors and officers should be held in the State; (3) to complete its main line to a certain point before commencing the branch road; (4) had to submit itself to the general act of February 7th, 1853, regulating railroads, and (5) had to yield all general branching privileges except for the branch to

Austin. It is no answer to the claim of consideration to say 236 that it might have been required to do all these things, except the last, anyway, for certainly the legislature did not consider that such power was possessed by it beyond dispute, and certainly it could not have been deprived by the legislature against its will of the general branching privileges conferred by its original charter.

Moreover, the legislature frequently extended the benefits of the general act of January 30th, 1854, to railroad companies not otherwise entitled thereto. Originally the act applied only to companies chartered before its passage, yet it was extended in many instances to companies thereafter created (*Quinlan v. H. & T. C. Ry Co., supra*). If by a subsequent act the benefits of the general law could be extended to companies chartered after as well as before its enactment, why might it not also be extended to a company for the construction of a branch line?

The following language used by this court in the Quinlan case is applicable here:

"Section 18 of its charter extends to the Waco Tap Railroad

Company in express terms the privileges of earning lands which were granted to other railroad companies by the general law of January 30th, 1854. The meaning of the section is as clear as if the provisions of the general law had been repeated in the act. It incorporates the privileges of that law and makes them a part of the special charter. By reference to the act we note what the privileges were which were intended to be granted. The practice of making the provisions of one statute applicable to another by a reference to the former law in the new act is of frequent occurrence in legislation both in England and in this country, and such legislation has been uniformly recognized as valid, as far as we have been able to discover."

Such also was the object and purpose of the special act of January 23rd, 1853, expressly extending to this company "the rights, benefits, and privileges granted by the act of January 30th, 1854." The company was already entitled, as we have seen, to the benefits of that act for the construction of its main line. It would have been idle and useless, therefore, for the legislature to have incorporated that provision in the act of January 23rd, 1856, extending the benefits of the general act of 1854 to the company, unless it was for the purpose of extending it to the line to Austin, which, as we have seen, the company had been authorized by the special act of February 7th, 1853, to construct. Effect must be given to the act, and the only effect of the provision stated was to extend the right to lands for the construction of the Austin line. If it had not that effect, then it had no effect, and the legislature meant nothing by it. The extension of the right, as made by the act of 1856, was of "the rights, benefits, and privileges" of the act of 1854, without other restriction than construction. The Austin line, which, as the law stood, the company was authorized to construct, was not excepted. Section 5, as we have seen, required the company to yield all branching privileges except for the line to Austin, and this evinces the purpose of the legislature not to grant lands for branches generally, but only for the main line and the line to Austin. But for section 5 the company might have constructed branches to various points, and under the act of 1856 claimed the land grant therefor, and that section was designed to guard against that contingency. There could have been no other reason for the incorporation of section 5. It is too well known to admit of dispute that the policy of the State at that time was not averse to the construction of railroads, and the construction of a multitude of branches by this company, if it could have been accomplished without State aid, would have been welcomed by the State and the people; but the State was not willing to grant lands for construction without limit and without knowing the particular lines to be constructed and for which the land grant might be claimed. Hence by section 5 the State required the company to yield all branching privileges except for the Austin line, thereby confining the grant to the main line and the line to Austin and placing a limit upon the grant which, under the act of 1856, this company might otherwise claim.

The rights of the company under the acts referred to were preserved, and the consequence of its inability to construct its road as expeditiously as contemplated by them provided against by the special acts of September 1st, 1856, and February 8th, 1861, referred to in the foregoing statement, and by the last-mentioned act the company was given until the 30th day of January, 1863, to construct so much of its road as it should have constructed prior to that time. Before the expiration of the time thus extended the two general acts of January 11th, 1862, were passed, whereby the operation of the act of January 30th, 1854, and the time for construction were extended until two years after the close of the war (*Quinlan v. H. & T. C. Ry Co., supra*; *R'y v. Kuechler*, 36 Tex., 383; *Davis v. Gray*, 16 Wall., 203). The war closed August 20th, 1866 (Grigsby *v. Peake*, 54 Tex., 149; *Freeborne v. Protector*, 12 Wall., 702), instead of May 28th, 1865, as found by the court below (finding 7, Trans., 58). We have seen that both the acts of January 11th, 1862, required this company, in order to secure the benefits thereof, to restore the stockholders who had been closed out by a sale of the company's property, rights, and franchises to the position of stockholders by a resolution of its directors, which resolution was by the acts made irrepealable, and that this was complied with by the company (Trans., 128, 129), whereby an additional element of contract, based upon a valuable consideration, was incorporated into the rights of the company under the legislation referred to.

239 We submit, furthermore, that by analogy to the constitutional provision extending the statutes of limitations until the acceptance of that constitution by the United States Congress, which was March 30th, 1870, the time which elapsed between March 2d, 1867, when the first reconstruction act was passed, and March 30th, 1870, when the constitution of 1869 was accepted by Congress, is not to be computed in calculating the time within which construction was required under the acts of 1866 and prior laws. (Constitution 1869, art. XIII, sec. 43.)

Within two years after the war and while the act of January 30th, 1854, and other laws in question were in force the general act of November 13th, 1866 (Gen. Laws 1866, p. 212), was passed, whereby such laws were extended for ten years more from that date. The effect of this act was to continue to railroad companies which had organized and commenced work under their charters and under the act of January 30th, 1854, the right to earn lands for construction during an additional period of ten years from November 13th, 1866. Whether these laws with respect to companies which had not acquired rights by organization and construction prior thereto were repealed by the constitution of 1869 or whether they were affected at all by that constitution we will consider later on under another ground of this application. Certainly they were not repealed and could not be under the Constitution of the United States with reference to companies which had organized and commenced construction, thereby acquiring a vested right to the benefits conferred by them (*Davis v. Gray*, 16 Wall., 203; *R'y v. R'y*, 70 Tex., 649.) This company had constructed an important part—the greater part, per-

haps—of its lines, and was diligently prosecuting the work when the constitution of 1869 was adopted; hence its rights under the laws referred to, including the act of November 13th, 1866, were unimpaired by that constitution and were in full force and effect when the Austin line, on account of which the certificates in question were issued, was constructed and completed. It follows, therefore, that the company was entitled to the land sued for under those laws, and in view of the special act of August 15th, 1870, waiving forfeiture for failure to construct, etc., and that the certificates were properly and lawfully issued to it under such laws, regardless of the special act of September 21, 1866, which we shall present and discuss under a separate and subsequent ground and under which we contend that the right of the company to the lands in question is absolutely conclusive. The general act of November 13th, 1866, also removed the restrictions contained in the act of January 30th, 1854, with reference to branch lines, and expressly provided in section 4 "that all tap roads over twenty-five miles long shall be entitled to the benefits of this act," thereby conferring the right by the general law, in addition to the right conferred, as above contended, by the special act of January 23rd, 1856, for the construction of the Austin line. This law was in force when that line was constructed, and, the line being over twenty-five miles long, the company was entitled to the land grant therefor under that act, as well as under the special act last named. It is true that the act of 1854 excluded "branch" roads, while the act of 1866 included "tap" roads; but if there is any difference between "branch" roads and "tap" roads we fail to recognize or appreciate it, and certainly there should be none in law. The object of the act of 1866 was to promote by land grant the construction of the roads theretofore aided in that manner, and also the construction of all other roads intersecting with main lines, thereby securing for the State an extended system of roads, and the policy of the State and the object sought to be accomplished by the legislation and the convenience of the people would be equally subserved, whether such lines 241 were termed "branches" or "taps." There could be no magic in the name, and if there should be any distinction it must be in name only, and that, too, purely arbitrary and without any practical difference.

Seventh.

Constitutionality of Act of November 13, 1866.

The said court of civil appeals erred, in effect, in overruling and holding not well taken petitioners' eleventh assignment of error, complaining of the action of the court below in holding that the general act of November 13th, 1866, above referred to, was in conflict with the constitution, and therefore null and void.

Statement.

See Petitioners' Brief, p. 15, 8th conclusion of law filed by the court below (Trans., 58).

Authorities.

Quinlan v. H. & T. C. R'y Co., 34 S. W. Rep., 738.

Argument.

Since the ruling of the court below complained of this court has settled the question against that ruling by its opinion in the Quinlan case, above referred to, from which the error of the court below is obvious. That case abundantly supports this ground and renders any further discussion of the point unnecessary.

Eighth.

Special Act of February 4, 1858.

The said court of civil appeals erred, in effect, in overruling and holding not well taken petitioners' ninth assignment of error, which complained of the action of the court below in holding that the special act of February 4th, 1858, in so far as the same granted lands to petitioner company, ceased to be operative at the time the act 242 of January 30th, 1854, granting lands to railroad companies, expired by limitation.

Statement.

See Petitioners' Brief, page 13, and fifth conclusion of law filed by the court below (Trans., 58). See also special law passed February 4th, 1858 (Special Laws 1858, chap. 86, p. 94). Section 2 of this act relieved the company of the consequence of its failure to construct a certain section of its road by a given time if said company should complete said section by the 30th day of July, 1859, and provided "that on the completion of subsequent sections of twenty-five miles only after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile contemplated in such last-mentioned act for each section so completed," etc. The proviso of that section was "that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force."

Argument.

The ruling complained of was doubtless based upon the erroneous view pointed out in the preceding ground, entertained by the court below, to the effect that the general act of November 13th, 1866, extending for ten years the law granting lands to railroad companies, was unconstitutional, and that therefore the general act of January 30th, 1854, expired by its own limitation two years after the close of the war. This view, as we have seen, was wrong. Since the general act of November 13th, 1866, was constitutional and extended the laws in question for ten years from the

date of its passage, the rights conferred by the special act of February 4th, 1858, continued for the same period. This act conferred upon the company a grant of sixteen sections of land per mile for all road constructed while the general laws were in force without any restriction as to branch lines or otherwise than with respect to the time of construction. Upon the construction of road within the time mentioned in the act, and which, as we have seen, was extended from time to time by subsequent acts, the company became entitled, by virtue of the act of February 4th, 1858, regardless of other acts, to sixteen sections of land for each mile so constructed.

Ninth.

Special Acts of Sept. 21, 1866, and Aug. 15, 1870.

The said court of civil appeals erred in overruling and holding not well taken petitioners' twelfth assignment of error, complaining of the action of the court below in holding that petitioner railway company was not entitled to the lands in question under the special act of September 21st, 1866, granting lands to petitioner company, and in overruling petitioners' fourteenth assignment of error, which in effect complained of the action of the court below in holding that the special act of August 15th, 1870, for the relief of petitioner railway company, and which, among other things, waived all right of forfeiture by reason of any failure to construct the road, as required by prior laws, was unconstitutional, null, and void.

Statement.

See the special act entitled "An act granting lands to the Houston and Texas Central Railway Company," approved September 21st, 1866 (Special Laws 1866, p. 33), section 1 of which reads as follows:

"That the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, 'in accordance with the provisions of the charter of said railroad company;' provided, that the lands heretofore drawn by said company, by virtue of an act to encourage the construction of railroads in Texas, by donation of lands, 'approved January 30th, 1854,' be deducted from the amount of lands granted hereby; and provided further, that the land certificates heretofore issued to this company, on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act, as if issued by virtue of its provisions; and further provided, that said company shall construct, and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1st, 1867, or fifty miles within two years from that date; and such grant of land shall be discontinued when said company shall fail to construct, and

complete at least twenty-five miles of the road contemplated by their charter, each year, after the construction of said first-mentioned fifty miles of road; provided, that said road shall be put in running order to Bryan's station, and cars run regularly thereon, by the first day of September, 1867."

See, also, the special act of August 15th, 1870, sec. 4 (Special Laws 1870, chap. 148, pp. 325-328), entitled "An act for the relief of the Houston and Texas Central Railway Company." See, also, Brief, pages 16-19. See conclusions of law 9 and 10, filed by the court below. (Trans., 58.)

Argument.

Strange as it may seem, the attorney general has not as yet attacked the validity of the special act of September 21st, 1866, above referred to. It is impossible for us to conceive of any grounds upon which he could do so. It was obviously within the power of the legislature at the time to make the grant; 245 and that it conferred the grant for the line to Austin, as well as for the main line, has not been and cannot reasonably be disputed, for it was "for every mile of road it has constructed, or may construct, and put in running order in accordance with the provisions of the charter of said railroad company." His contention is (Appellee's Brief, p. 8) that the company lost the right by the failure to construct as expeditiously as that act required. There are several effectual answers to this contention, one of which is that the executive officers of the State having determined the fact of construction and issued the certificates, that question is concluded and is not open to inquiry in this connection; but that answer we shall present fully in support of a subsequent ground of this application, where it more appropriately belongs. Another is that the State not only failed to claim the forfeiture by any appropriate proceeding to declare it, but expressly waived it by an act of the legislature. This was accomplished by section 4 of the act of August 15th, 1870, providing that "no forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the twenty-first of September, A. D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company,' but said company shall have and enjoy all the rights and privileges secured to it by existing laws the same as if the conditions embraced in the first section of the act of the twenty-first of September, A. D. 1866, had been in all respects complied with, etc." But the court below and the court of civil appeals hold this act unconstitutional and void. This holding could only have been upon the ground that the act undertook to grant lands, but if there is any provision of the act assuming 246 to make such grant, it is not pointed out. The court of appeals, in their opinion (page 2), seemed to assume that the right to construct a line to Austin was conferred for the first time

by this act, and in that manner they seem to endeavor to stretch the opinion of this court in *G., H. & S. A. Ry Co. v. State*, 34 S. W. Rep., 749, to sustain their ruling. In that case the court held that the right of the Galveston, Harrisburg and San Antonio Railway Company to construct a line to San Antonio did not exist until it was conferred by the act of July 27th, 1870. In this case the right of this company to construct a line to Austin, aside from the general branching privileges conferred by the original act of incorporation, passed March 11th, 1848, was expressly conferred, as we have already seen, by the act of February 7th, 1853 (Special Laws 1853, p. 36), and was preserved throughout the subsequent legislation relating to this company. The right, therefore, beyond any sort of question, to construct a line to Austin, existed before and wholly independent of the act of August 15th, 1870. That act, upon this point, merely merged the Washington County railroad into and made it a part of the Austin line, and reiterated the authority previously granted to the company to extend the line to Austin. It could have paralleled the Washington County railroad and could have secured the Austin line by construction throughout. The legislature perceived the lack of any necessity, and indeed the folly of this, and evinced the wisdom of confirming the acquisition of the Washington County railroad and the merging of it into the Central as a part of the Austin line, thereby saving the land—about 336 sections, or 214,040 acres, which the company could have earned by constructing another instead of purchasing the existing line. That the legislature had the power to do this no one, we apprehend, will deny. The Washington County railroad was thereby made merely a part of the line to Austin, which the company 247 had before been authorized to construct. The difference between this case and the case cited by the court of appeals is obvious. The lands had been granted by prior laws, particularly the special act of September 21, 1866, about the validity of which there can be no serious question. The right thereto under such laws existed subject to any ground of forfeiture that may have arisen by reason of the failure of the company to construct its road within the time contemplated by those laws. Now, what we claim with reference to this point by virtue of the act of August 15th, 1870, is that the State thereby expressly waived any and all such grounds of forfeiture. That section 4 was intended to have this effect admits of no question, and that such was its effect, if valid, is absolutely clear. Was it valid? There was nothing in the constitution of 1869 preventing the legislature from waiving any forfeiture of lands granted railway companies, except for the failure to alienate the same (constitution 1869, art. X, sec. 7). Unrestrained by the constitution, the legislature, beyond question, had the right, as it did by the statute referred to, to waive any ground by reason of delay in construction that may have existed for the forfeiture of the lands granted to this company by the prior laws which we have discussed. Indeed, it could do more. Where the right had accrued under laws passed prior to the constitution of 1869, the legislature, as was held by this court in *Holmes v. Anderson*, 59 Tex., 481, had the right

thereafter to pass laws to complete or perfect that right, and this notwithstanding the fact that such right might have been perfected under existing general laws. We have no occasion to invoke that principle here, but refer to it as a refutation of the apparent impression in some quarters that the constitution of 1869 absolutely

248 paralyzed the power of the legislature with respect to private land grants made before as well as after its adoption. It seems to us too clear to require further argument to show that section 4 of the act of August 15th, 1870, was in all respects valid. The reference by the attorney general, on page 7 of his brief, to the "supposed act of August 15th, 1870," indicates a disposition to make further question respecting that act, which stands so much in his way. It is true that the political household of the then governor, especially his secretary of state, whose disposition was to rule or ruin (and generally both), sought to discredit the act by procuring ex-employés of the legislature to endorse unauthorized statements on the act in the office of the secretary of state, as shown on the original enrolled bill and as appended to the act as published in the special laws of that session (pages 328-330). Of course, this effort to override and defeat the will of the legislature with respect to a matter within their power failed, and all question in reference to this identical act upon this point was set at rest by this court long ago in *H. & T. C. Ry Co. v. Odum*, 53 Tex., 343.

It is contended, however, that the right to the land grant given by the act of September 21st, 1866, had been forfeited by the failure to complete certain parts of the road before the act of August 15th, 1870, was passed. There are, we submit, two conclusive answers to this contention. The first is that the forfeiture had not been declared by any judicial proceeding for that purpose or by any act of the legislature equivalent to a judgment of "office found" at common law, and it seems entirely clear that one of these was necessary. We submit that this point is absolutely settled by the Supreme Court of the United States in *St. L., etc., R. Co. v. McGee*, 115 U. S., 469, 473, 474; *Van Wyk v. Knevals*, 106 U. S., 360, and *Bybee v. Oregon*, etc., *R. Co.*, 139 U. S., 663, 675, and by other cases in that court, as well as in other courts. It is also settled, in effect, 249 by the decision of this court in *G., H. & S. A. Ry Co. v. State*, 81 Tex., 572, though the court did not go and was not called upon in that case to go as far as it might have gone. In *St. L., etc., R. Co. v. McGee*, *supra*, the act of Congress under consideration provided that if the road was not constructed within ten years from the time the act went into effect "the lands granted or the grant of which is revived or extended by this act, and which at the time shall be unpatented to or for the benefit of the road or company, shall revert to the United States," and the court said:

"It has often been decided that lands granted by Congress to aid in the construction of railroads did not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislative action legally equivalent to a judgment of office found at common law. * * * Legislation to be

sufficient must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity."

None of the Texas acts in question are as strong as the act of Congress referred to. The latter declared that upon the failure to construct the road within the time named the land "shall revert to the United States." Of course, it is not claimed that any judicial forfeiture was ever sought by the State, and the question then arises whether there was any "legislative action legally equivalent to a judgment of office found at common law," and we have seen that "legislation to be sufficient must manifest an intention" by the legislature "to reassert title and to resume possession," and that "as

it is to take the place of a suit" by the State "to enforce a
250 forfeiture and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity" (115 U. S., 473, 474). Where is there any such legislative action? No act was ever passed by the legislature declaring these lands forfeited and reclaiming them to the State. Not one word indicating any such intention upon the part of the legislature is found in the statutes. On the contrary, we have seen that, instead of enforcing any right of forfeiture that might have existed, the legislature by the special act of August 15th, 1870, expressly waived it. It is absolutely clear that there has been neither a judicial nor a legislative enforcement of any right of forfeiture with respect to these lands. If we may consider the constitution of 1869 as "legislation" in the sense here used, obviously it contains nothing "legally equivalent to a judgment of office found" with respect to this matter. Article X, section 6, at most only prohibited grants. It did not forfeit grants, and section 7 only assumed to forfeit lands for the failure to alienate the same as acquired by law and not for failure to construct. There is absolutely nothing in that constitution that could, without doing violence to settled law, be construed as equivalent to a forfeiture of these lands for a failure to construct the road as required by the acts granting them. There is not only no such description of the land or the grant and no specific reference to them at all as is absolutely necessary under the authorities in every case of legislative forfeiture, but there is no forfeiture at all, by general terms or otherwise. The action of the executive department is also important in this connection. They recognized the validity of the grant and the right of the company to the lands in question. They never asserted any forfeiture and took no action

251 indicating that they understood that any forfeiture was intended by the constitution of 1869 or sought to be enforced

in any manner by the legislature, but, on the contrary, the governor, whose hostility to such grants was violent and who was ever ready to dispute them, appointed an engineer to inspect the road as a basis for the issuance of certificates, and in pursuance of such inspection they were issued by the commissioner of the general land office. No proceeding to enforce and declare a forfeiture

by judicial decree was ever authorized by any of the eminent men who have since filled the office of governor.

It would seem, therefore, that our claim that there could be no forfeiture of the lands in question for failure to construct without a judgment to that effect in an appropriate judicial proceeding or some legislative action legally equivalent to a judgment of office found is absolutely conclusive. In this connection we desire also to call the court's attention to *United States v. Willamette, etc., Co.*, 54 Fed. Rep., 807, and *United States v. Willamette, etc., Co.*, 53 Fed. Rep., 711, the opinions having been delivered by Circuit Judge Gilbert, in which, among other things, it is held that forfeitures for the breach of the condition that the road should be completed in a specified time could only be enforced by legislative enactment or judicial proceeding, in the absence of which the road might be completed, and forfeiture thereby prevented, even after the time limited had expired. While they are not binding as authority, yet the distinguished ability of the judge who decided them gives them weight, and they are, moreover, in line with principles running through cases in the Supreme Court of the United States.

Another answer equally conclusive to the contention of the State that the right to the land grant given by the act of September 21st, 1866, had been forfeited by the failure to complete certain parts of

the road before the act of August 15th, 1870, was passed is
252 that the road having been in fact constructed as required by law, and the fact of construction and completion having been ascertained and determined by the executive department of the State charged with that duty, and the certificates issued accordingly, the time of such completion is not open for further inquiry by the court, especially in a collateral proceeding. There is no legislative act, no judgment of record, to indicate that the road was not completed within the time required by law—nothing to put any one on notice or even inquiry as to that fact—but, on the contrary, the action of the executive department in the issuance of the certificates affords evidence, and, indeed, conclusive evidence, that the road was constructed as required by law. We shall not pursue this point further here, but reserve it for discussion under another ground of this application.

There is still another answer which seems conclusive. The convention which framed the constitution of 1869 by a declaration "for the relief of the Houston and Texas Central Railway Company," passed December 23rd, 1868, declared (Ordinances Convention 1869, page 59):

"It is hereby declared by the people of Texas in convention assembled that the Houston and Texas Central Railway Company shall not suffer any forfeiture of any rights secured to it by existing laws by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robertson county, by the first day of January, A. D. 1869, as required by the act of the twenty-first of September, A. D. 1866, provided said railway shall be constructed and put in good running order

for the use of the public to the said town of Calvert by the first day of April, A. D. 1869."

We are aware that this court held in the Quinlan case that the convention which framed the constitution of 1869 was without general power to legislate. The declaration above quoted, however, was not legislation of the character in question in that case. It was a declaration by the only organ of the State existing at the time, the only representative of the will and expression of the voice of the people. The declaration in question was not a measure designed to direct and control the action of the people and was not intended to impose a liability upon the citizen, as was the ordinance under consideration in the Quinlan case. It was merely an expression and declaration of the will and purpose of the State by the only organ or representative of its civil existence to waive a ground of forfeiture which the State had the power to waive, which it was appropriate that it should waive, and which at that time, perhaps, could be waived in no other way. We earnestly submit, therefore, that the declaration was essentially different in character and purpose from that in question in the Quinlan case, and that it was one which the convention, as the representative of the people of the State, had the right to make. Certainly it seems to us that under the decisions of this court in *Stewart v. Crosby*, 15 Tex., 546, and *Grigsby v. Peake*, 57 Tex., 142, particularly the latter case, holding the ordinances of that convention to be valid, the above declaration ought to be held as coming within the powers of the convention. The most prudent person would have been warranted in so regarding it under the decisions in those cases, and in view of the property rights which have vested upon the faith of the law as thus declared and understood it does seem that the court should be slow to overturn its solemn adjudications of former days when only injustice will result therefrom and when not demanded by any principle of public policy or private right.

We insist, therefore, with confidence that the company was clearly entitled to the lands in question under the general laws of 1854, 1862, and 1866 and the special laws relating to it, and particularly the special law of September 21st, 1866, and that such rights were never forfeited for these reasons, among others, either one of which is conclusive, viz: (1) Any ground of forfeiture that may have existed was expressly waived, not only by section 4 of the special act of August 15th, 1870, but also by the declaration of the constitutional convention of 1863-'9; (2) there was never any legislative or constitutional forfeiture or act equivalent to judgment of office found, and there was never any enforcement of any ground of forfeiture by judicial decree without one of which there could be no forfeiture, and (3) the executive department charged by law with that duty determined the fact as to the construction, and found that it was in accordance with the laws of the State and issued the certificates accordingly, and such finding is not open to further inquiry.

Tenth.

Constitution of 1869 with Reference to Repeal.

The said court of civil appeals erred in overruling and in holding, in effect, not well taken petitioners' seventh assignment of error, which complained of the action of the court below in not holding that the laws of January 11th, 1862, and their acceptance by petitioner company, restoring the stockholders to their original position in consideration of the grant and benefits of that act to this company, was a contract between this company and the State, entitling it to all the benefits of the act of 1854 and the several amendments and supplements thereto granting lands to railway companies within the protection of the Constitution of the United States and denying any State the power to pass any law impairing the obligation of contracts, and in overruling petitioners' eighth assignment of error, complaining of the action of the court below in holding that the special act of January 23d, 1856, authorized the repeal of the said act of 1854 in so far as the same affected this company.

255

Statement.

See Petitioners' Brief, pages 11, 12, findings of the court below (Trans., 57, 58), Gen. Laws 1862, chap. 62, p. 43, sec. 2, and chap. 69, pp. 46, 47, sec. 4. That provision of the special act of January 23d, 1856 (Special Laws 1856, chap. 20, p. 28), upon which the ruling of the court below complained of in the eighth assignment of error was based is found in section 6, which reads as follows:

"SECTION 6. That nothing in this act shall be so construed as to effect (affect) the right of the State to repeal or modify the act of January 30th, 1854, entitled 'An act to encourage the construction or railroads in Texas by donations of lands,' provided that the rights to lands acquired before said repeal or modification shall, in all cases, be protected."

Authorities.

Railway Co. v. Kuechler, 36 Tex., 383.

Railway Co. v. Groce, 47 Tex., 437.

Railway Co. v. Railway Co., 70 Tex., 656, 657.

Davis v. Gray, 16 Wall., 203.

Argument.

Of course, no one contends that the legislature ever repealed any of the laws in question before the completion of the road and the issuance and location of the certificates. It is contended, however, that such repeal was accomplished by article X, section 6, of the constitution of 1869, which reads as follows:

"SECTION 6. The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

256 But for the contention of the attorney general in cases of this character and some expressions here and there in the reports of this court, it would not seem to be necessary to advance any argument to show that this provision of the constitution did not have the effect to repeal existing laws granting lands to aid in the construction of railroads. It has none of the elements of a repealing act and embraces no language appropriate to that object. Certainly it would seem that if it was intended to repeal existing laws language usually employed for that purpose or some appropriate words would have been used to express such intention, especially as such intention would have been to revolutionize the settled policy of the State and at variance with the uniform will of the people and the legislature, as expressed in numerous statutes. To hold this provision a repeal of existing laws in any respect or to any extent is to set at naught the principles of construction in such cases running back to the foundations of our law and to extend the ill-favored doctrine of repeals by implication, as we believe, beyond any precedent in the history of this country or of England. It seems obvious, from the language used, that the provision was intended to have prospective effect only. It did not, by its terms, undertake to repeal any law whatsoever. It did not purport to undo anything the legislature had done, but only imposed a limitation upon the power of the legislature thereafter. It did not deal with the past at all. It related entirely to the future. "It is," as said by this court, "a rule of construction to be generally adhered to in the construction of constitutions, as well as statutes, that they operate prospectively, unless the words employed or when the object in view and the nature and character of the provision clearly shows that it was intended to have retrospective operation" (*Orr v. Rhine*, 45 Tex., 345, 354).

257 We may be pardoned for stating, with some authorities, the familiar rules that repeals by implication are not favored, and where earlier and later acts can by any reasonable construction stand together they must so stand, and the latter act does not repeal the earlier unless their provisions are clearly inconsistent or repugnant (*Hanrieck v. Hanrieck*, 54 Texas, 108; *Neil v. Keese*, 5 Tex., 22; *Laughter v. Seela*, 59 Tex., 183; *The Distilled Spirits*, 11 Wall., 356-364; *Anderson's Tobacco*, 11 Wall., 652, 658; *Davis v. Fairborn*, 3 How., 636-644; *U. S. v. Walker*, 22 How., 399, 411; *McCool v. Smith*, 1 Black, 459, 470); that privileges granted by a special act or charter are not affected by general legislation on the same subject, but the special charter and general law must stand together, the one as the law of the particular case and the other as the general law of the land (*Laredo v. Martin*, 52 Tex., 561; *Ellis v. Botts*, 26 Tex., 707; *Scoby v. Sweat*, 26 Tex., 728; *State v. Stoll*, 17 Wall., 425, 436; *Ex parte Crow Dog*, 109 U. S., 570; *New Jersey v. Yarde*, 94 U. S., 104-117; *Gowan v. Harley*, 12 U. S. App., 574, 584), and that repugnancy in principle will not suffice (Sutherland on Statutory Constr., sec. 137). The prohibition against the legislature making grants of land in the future is certainly not necessarily inconsistent or irreconcilable with an intention to leave the past acts

of the legislature undisturbed. It is true that in *Bacon v. Russell*, 57 Tex., 409, and *G., H. & S. A. Ry Co. v. State*, 81 Tex., 572, language may be found which can be construed to support the claim of a partial repeal by this provision of the constitution, but the question was not involved and was not decided in either of those cases, and in both it was expressly held that if it was intended as a repeal of existing laws it could not affect rights that had accrued thereunder. The question was again touched upon, but not decided, in *Quinlan v. H. & T. C. R. Co.*, 34 S. W. Rep., 738, and *G., H. & S. A. Ry Co. v. State*, 34 S. W. Rep., 749, but this court

258 has never as yet decided that the provision in question operated as a repeal of existing laws to any extent, however remote. On the other hand, the question was directly involved and decided in accordance with our contention by this court in *Railway v. Kuechler, supra*, where it was said (36 Tex., 398):

"But it is insisted by the attorney general that all grants of land to railroad companies are destroyed and inhibited by the present constitution. We do not think so.

"The 6th section of 10th article of the constitution, which provides that the 'legislature shall not hereafter grant lands to any person or persons,' etc., is plainly prospective in its operation and was not intended to affect the claim of railroad companies to lands under former laws. It is not our information that such a meaning was claimed for it by any member of the convention when this section of the constitution was under discussion."

This construction was accepted even by Governor Davis (Trans., 131). It is quite common, we know, to question the authority of the decisions of the court as constituted at that time, but whatever may be said of the court as organized under military authority there can be no doubt that the court delivering the opinion in the case last cited was as much a constitutional court and as much entitled to exercise its functions and jurisdictions as such as the court is with its present organization. While its decisions in cases involving political questions may be disregarded because of the intense political feeling prevailing at the time and with which it is suspected the court was tainted, yet there is no reason why its opinions upon property rights should not be entitled to the force of precedent to the same extent as other decisions of this court. Indeed, we doubt if there is a volume of the reports of this court 259 published in recent years that does not contain a reference to some decision of the court as thus constituted as authority upon some point; and the decision in the case relied on did not involve some mere quasi-political question relating to the powers of government or the exercise or extent of governmental powers likely to shape the course of the Government in some important particular in the future, but it was essentially a question of property that the court determined. The distinction is clearly pointed out in *Willis v. Owen*, 43 Tex., 41. Largely upon the faith of that decision and the property rights as there settled many miles of railroad have been constructed, certificates for thousand of acres of land have been issued and located, and, as said by the Supreme Court of the

United States, "patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this date be called in question." (*Kansas, etc., R. Co. v. Atchison, etc., R. Co.*, 112 U. S., 414, 418; 98 U. S., 340, 341.)

We also contend that the declaration "for the relief of the Houston and Texas Central railway," passed December 23rd, 1868 (Ordinances Convention 1868-'69, page 59), (and which we have discussed under the ninth ground of this application, *ante*—) is at least a circumstance entitled to great weight to show that the framers of the constitution did not intend to impair any of the rights of this company to the land grant in question, and the proceedings of the convention fully warrant the observation of the supreme court in the Kuechler case (36 Tex., 398), respecting art. X, sec. 6, that "it is not our information that such a meaning was claimed for it by any member of the convention when this section of the constitution was under discussion."

We insist, therefore, that the constitution of 1869 was not intended and did not have the effect to repeal any laws granting lands to railroads passed before its adoption, and that such laws were unaffected in any manner or to any extent by it, and this regardless of any question whether construction had commenced and money expended under such laws before the adoption of that constitution; in other words, the provision of the constitution had a prospective effect only and related entirely to future grants, leaving absolutely untouched existing laws. This conclusion is unavoidable unless it was a repealing act, and its language, we submit, excludes that idea. It is unnecessary, however, to go so far in this case, because it is not open to question that this company had proceeded under such laws and constructed the greater part of its line before the constitution of 1869 was adopted, thereby securing a vested and contract right, which cannot be taken away without violating the Constitution of the United States. This is recognized not only by decisions of this court (*G., H. & S. A. R'y Co. v. State*, 81 Tex., 572; *Railway Co. v. Railway Co.*, 70 Tex., 657), but is settled by the Supreme Court of the United States in *Davis v. Gray*, 16 Wall., 203, where it is said (p. 232)—

"That the act of incorporation and the land grant here in question were contracts is too well settled in this court to require discussion. As such they were entitled to the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. The ordinance of 1869 and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Notwithstanding this decision, the attorney general has contended in other cases of this character that under *Salt Co. v. East Saginaw*, 13 Wall., 373, a general land grant act is a

mere bounty law, repealable at the pleasure of the State, etc. It was decided in that case that a State may repeal a bounty law, and that no one has such a vested right in the benefits promised as to entitle him to demand the indefinite continuance of the law, but it was not decided that a State can, by the repeal even of a bounty law, impair or destroy rights which had accrued before the rep-al. The right to earn future bounties and the right to bounties already earned are very different things. In the case under discussion the plaintiff claimed the right to exemption from taxation in years subsequent to the repeal of the act conferring the exemption. The case would have been very different if, by reason of the repeal, the State had claimed taxes accruing before the repeal. There was no question as to the rights which had been earned while the bounty law was in force. Such rights the court would certainly have held to be inviolable, for, in declaring that bounty laws are not contracts, it added, "except so far as they have been actually executed and complied with" (p. 379).

But a general land grant act to promote the construction of railroads is not a mere bounty law; it discharges a duty which the State owes to its inhabitants; it imposes onerous obligations on the grantee; it secures valuable benefits to the grantor. The State is under no obligation to furnish its inhabitants with salt or aid them in the manufacture of it, but the duty does rest upon it to provide public highways. The duty is ordinarily performed through railroad corporations, which are regarded and treated as quasi-public agencies. It has long been the policy, not only of this State, but of the other States and of the United States, to encourage by State aid in lands or bonds or otherwise the construction of railroads when the undeveloped and sparsely settled condition of the country 262 does not offer sufficient inducement for the investment of capital in such enterprises. For such grants the building of the road is the contemplated and sufficient consideration. (Thomas v. Railroad, 101 U. S., 71, 83.)

The same court which rendered the decision in *Salt Co. v. East Saginaw* has declared that legislation similar to the acts of 1854 and of 1866 does not fall under the category of bounty laws. We refer to the case of *United States v. Denver and Rio Grande Ry Co.*, 150 U. S., 1, 8, 14.

(P. 8:) "It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the Government in opening to settlement and enhancing the value of those public lands through or near which such railroads might be constructed. To induce the investment of capital in the construction of railroads through the public domain Congress had previously granted special rights, etc."

And at page 14 the court again says:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implications. In *Winona and St.*

Peter Railroad v. Barney, 113 U. S., 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon the subject: 'The acts making the grants are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyances. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.'

"Looking to the condition of the country and the purpose intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law and manifesting clearly the intention of Congress to secure public advantages or to subserve the public interests and welfare by means of benefits more or less valuable offered to individuals or corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley v. New York and New Haven Railroad, 21 Conn., 294; Pierce on Railroads, 491."

Here, as we have seen, the rights of the company arose, not only under general laws, but under special acts as well. We deem it unnecessary to say more upon this point, because it is manifest that by the large construction by this company under these laws (and it matters not whether it was on the main line or the Austin line) the company acquired a contract and vested right which come within the protection of the Constitution of the United States.

Of the claim that the special act of January 23rd, 1856, authorized the State to repeal the act of 1854 so far as it affected this company, but little need be said. It is not claimed that the legislature ever repealed that act. We have seen that the constitution of 1869 could not have that effect; but suppose it were otherwise, the very act under which the power of repeal is claimed provides that the right to lands acquired before such repeal or modification shall in all cases be protected.

Action of Executive Department Conclusive.

The said court of civil appeals erred in overruling and holding not well taken petitioners' thirteenth, eighteenth, and nineteenth assignments of error, each of which in effect complained of the action of the court below in inquiring into and holding that it had the right to inquire into the time when the road in question was constructed, and in reviewing and holding that it had the right to review the finding and action of the executive department of the government in regard thereto, and in not holding that the finding and action of the executive department with respect to the comple-

tion of the different sections of the road and in issuing the certificates in question was conclusive, because petitioners say that it being a matter of fact, and the executive department being charged by law with the duty of ascertaining and determining such facts, and that department having ascertained and determined them, and having found the existence thereof and of all antecedent facts entitling the company to the land grant, and having issued the certificates as provided by law, such determination, finding, and action was and is final and conclusive and not open to inquiry by the courts herein.

Statement.

See Petitioners' Brief, pages 17-19, and the statement under the sixth ground of this application, *ante*, pages 16-21.

Authorities.

- 265 Hancock *v.* McKinney, 7 Tex., 384, 440-444.
 Jankins *v.* Chambers, 96 Tex., 166, 230.
 Styles *v.* Gray, 10 Tex., 503, 506.
 Ruis *v.* Chambers, 15 Tex., 586, 590.
 Herndon *v.* Robinson, 15 Tex., 599.
 Johnston *v.* Smith, 21 Tex., 722.
 De Court *v.* Sproul, 67 Tex., 370.
 G. H. & S. A. R'y Co. *v.* State, 77 Tex., 388.
 G. H. & S. A. R'y Co. *v.* State, 81 Tex., 597.
 Tarlton *v.* Kilpatrick, 21 S. W. Rep., 409.
 State *v.* Morgan (Ark.), 12 S. W. Rep., 243.
 United States *v.* Burlington and M. R. Co., 98 U. S., 334.
 Van Wyck *v.* Knevals, 106 U. S., 360.
 Kansas Pacific R. Co. *v.* Atchison, etc., R. Co., 112 U. S., 414.
 St. Louis, etc., R. Co. *v.* McGee, 115 U. S., 469.
 Bybee *v.* Oregon, etc., R. Co., 139 U. S., 663.
 United States *v.* Ala. R. Co., 142 U. S., 615.
 United States *v.* Union Pacific R. Co., 148 U. S., 562.
 United States, etc., Land Co., 148 U. S., 31.
 United States *v.* Denver, etc., R. Co., 150 U. S., 1.
 Chandler *v.* Calumet Mining Co., 149 U. S., 79.
 United States *v.* Budd, 144 U. S., 154.
 United States *v.* Dalles, etc., Co., 7 U. S. App., 297-316.

Argument.

This is not a case of a grant of land by executive action in the absence of express legislative authority. It is not a case where the court is called upon to determine, by construction, a doubtful question whether there existed legislation authorizing the grant. It is a case where there exists more than one legislative enactment granting in express terms the lands in question. It is a case where the action of the executive department was within and warranted by the most ample provisions of statutory law. There is the gen

eral law of 1854, extended by the legislation of 1862, November, 1866, and the special legislation relating to this company, conferring the grant in question in the broadest and most unmistakable terms. There is the special act of September 21st, 1866, which even the most sanguine advocate of the forfeiture of vested rights cannot find any pretext for questioning. Leaving out of view (though we submit with confidence that it is conclusive of the question) the act of August 15th, 1870, waiving all grounds of forfeiture, it is perfectly apparent that the company was entitled, by express statutory provisions, to the lands in question, if it constructed its road within the time required by such laws. Under the most favorable view of

the State's case which the wildest legal imagination can conceive, the only possible question is whether certain sections of the road were constructed within the time stipulated in some of those acts. This is a question purely of fact. As we have seen, it is not evidenced by any legislative enactment declaring the fact and assuming to enforce a forfeiture, nor by any judicial decree in a proceeding for that purpose. The legislative, the judicial, and the registration records of the State—beyond which certainly the citizen ought not to be required to go—are absolutely silent. It is a fact resting wholly within the treacherous memory of man, and by the great lapse of time this is well nigh, if not entirely, lost. It is true that there may be here and there some *ex parte* statement or affidavit or letter bearing upon the question, but which cannot be regarded as evidence, and which probably would never come to the knowledge of one looking to the title in question.

Such is the State's case stated in its most favorable aspect. In answer to it, we submit that the court should not and cannot rightfully go into the inquiry respecting such facts. By reference to the statute we find that the grant in question was expressly authorized by the legislature by more than one act couched in the broadest terms. We find that the road has been constructed and completed and is today in full operation, as it has been for many years, reflecting upon the State the benefits and advantages sought to be accomplished by such legislation. Looking to the provision and object of the statutes, we find that they have been fulfilled by the completion of the road contemplated. We find also that the governor, whose duty it was, under the law, appointed an engineer to inspect the road, who reported that it was completed as required by law (Trans., 94-101). We find that this report was approved by the governor, who directed the issuance of the certificates (Trans.,

131), and that the certificates were issued by the commissioner of the general land office, and were duly filed and located and recognized by the executive department. In short, we find that the executive department, whose duty it was under the law and whose obligation to obey the law was as binding as is the obligation of this court and who were invested by law with exclusive and final jurisdiction in that behalf, ascertained and determined the fact of construction and compliance with the provisions of the law, and in the exercise of their lawful authority thereupon issued the certificates in question. Now, we submit, with

confidence, that this is an end of the matter. The courts have no more right to review and set aside the findings of fact by the executive department, with respect to questions of fact entrusted to that department, than the executive department has to review and set aside the judgments of the courts upon questions of law within their jurisdiction. This is a self-evident proposition and it is entitled to full application. Such findings are entitled to even more than the force of *res adjudicata*. Judgments are matters of record, and they are based upon pleadings that show the facts, if not the evidence, on which they are based. They are matters of public record. The facts upon which the executive department acted, however, were not required by law to be preserved. The jurisdiction was exclusive and the finding made final by law. What the evidence was as to the time of construction we do not know. Most, if not the best, of it from lapse of time is not now available. If, under such circumstances, the courts can review such findings and set aside the conclusions reached by the executive department without knowing what the evidence was, then the value of land titles in this State is gone and rights which were supposed to be inviolable are frittered away.

That courts will not and cannot go into such inquiries and
268 assume to review the findings of fact by the executive department with respect to matters entrusted to that department has been settled by repeated decisions of this court and of the Supreme Court of the United States in language so strong and emphatic as to evidence a peculiar appreciation of the evils that would otherwise ensue. It is so appropriate and so material in this case that we may be pardoned for quoting freely from some of the cases referred to.

In the very first volume of the reports of this court it was declared by Chief Justice Hemphill that—

"The presumption of law that the public act of the public officer purporting to be exercised in an official capacity and by public authority shall be presumed to be the exercise of a legitimate and not an usurped authority is recognized in its full force." Heirs of Holloman v. Peebles, 1 Tex., 673, 699.

In Hancock v. McKinney, 7 Tex., 384, 440, the following language of the Supreme Court of the United States in United States v. Arredondo, 6 Peters, 729, was quoted with approval by Judge Wheeler:

"It is an universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter and its exercise is confided to his or their discretion the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred."

In Jenkins v. Chambers, 9 Tex., 167, 230, Judge Wheeler said:

"What evidence besides the report of the ayuntamiento was before the governor when he made the concession does not appear. In the evidence embodied in the record there is nothing to induce

the belief that the grantee did not present a meritorious
269 claim or that he was not justly entitled to the grant he ob-
tained; but if upon the evidence the merits of the applicant
were doubtful that question is not now open to discussion. The
governor was constituted by the law the judge of the qualifications
of the applicant. Having exercised his judgment and decided
upon the question legally submitted to his cognizance, his decision
is final. 'The only questions' (said the Supreme Court of the
United States in the case of *The United States v. Arredondo*) 'which
can arise between an individual claiming a right under the act
done and the public or any person denying its validity are power
in the officer and fraud in the party. All other questions are set-
tled by the decision made or the act done by the tribunal or officer,
whether executive, legislative, judicial, or special, unless an appeal
is provided for or other revision by some appellate or supervisory
tribunal is prescribed by law.'

In *Styles v. Gray*, 10 Tex., 503-506, Judge Lipscomb said:

"It is too much to require that the patentee and those claiming
under her should be called upon through all time to show that
every legal requisite had been complied with, and particularly to be
called upon to show that proofs had been made in cases depending
upon verbal or parol evidence of which no record was kept or re-
quired by law to be kept; and when it is considered that the evi-
dence of her having the requisite qualifications to receive a head-
right had been subjected to the judgment and approval of the board
of land commissioners of the county and had by them been approved
and again examined and approved by the traveling board and
finally approved by the commissioner of the general land office,
who, if he had any doubts, was required by the statute to take the
opinion of the attorney general, surely it is time the subject should
be put at rest."

In *Ruis v. Chambers*, 15 Tex., 586, 590, Chief Justice Hemphill
said:

270 "The law was susceptible of two constructions, and, the of-
ficer whose function it was to act under the law having de-
cided, his decision could not now be disregarded without establish-
ing a principle which might strike deeply at the validity and
security of the land titles of the country."

This language of the fathers of the jurisprudence of this State is
peculiarly applicable to the case at bar. See also *Herdon v. Rob-
inson*, 15 Tex., 599; *Johnston v. Smith*, 21 Tex., 722; *De Court v.
Sproul*, 62 Tex., 370, and the more recent language of this court in
G. H. & S. A. R'y Co. v. State, 77 Tex., 388, and *G. H. & S. A. R'y
Co. v. State*, 81 Tex., 597.

Turning now to the Supreme Court of the United States, we invite
the court's attention to the early case of *United States v. Arre-
dondo*, 6 Peters, 691, already quoted from. In *United States v.
Burlington, etc., R. Co.*, 98 U. S., 334, 341, the court said:

"All the reasons which led to the enlargement of the original
grant led to its enlargement to the branches. It was the intention
of Congress, both in the original and in the amendatory act, to place

the Union Pacific Company and all its branch companies upon the same footing as to land, privileges, and duties to the extent of their respective roads except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the Government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

This language was reiterated in *Kansas Pacific R. Co. v. Atchison, etc., R. Co.*, 112 U. S., 414, 418.

271 In *Maxwell Land Grant case*, 121 U. S., 325, 381, Justice Miller said :

" We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the efforts to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who choose to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This was reiterated in *Colorado Coal Co. v. United States*, 272 123 U. S., 307, 316, and in *United States v. Budd*, 144 U. S., 154, 161. In *United States v. Ala. R. Co.*, 142 U. S., 615, 621, it was said :

" We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of this act, certainly consorts with equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in

case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive and to require from him the repayment of moneys to which he had supposed himself entitled and upon the expectation of which he had made his contracts with the Government."

In *United States v. California, etc., Land Co.*, 148 U. S., 31, 43, it was said :

"Further, the significance of the certificates of the governors, as an independent matter in this inquiry, must not be overlooked. Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal his or its determination is conclusive. Thus in the case of *United States v. Arredondo*, 6 Pet., 691, 729, this court said : 'It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter

273 and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred.'

The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170, 171), legislative (4 Wheat., 423; 2 Pet., 412; 4 Pet., 563), judicial (11 Mass., 227; 11 S. & R., 429, adopted in 2 Pet., 167, 168), or special (20 Johns., 739, 740; 2 Dow P. C., 521, etc.), unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law.' See also the following cases: *Foley v. Harrison*, 15 How., 433, 448; *Johnson v. Towsley*, 13 Wall., 72, 83; *Smelting Company v. Kemp*, 104 U. S., 636, 640; *Shepley v. Cowan*, 91 U. S., 330, 340; *Moore v. Robbins*, 96 U. S., 530, 535; *Quinby v. Conlan*, 104 U. S., 420, 426; *Steel v. Smelting Co.*, 106 U. S., 447, 450; *Lee v. Johnson*, 116 U. S., 48, 51; *Wright v. Roseberry*, 121 U. S., 488, 509."

See also *United States v. Union Pacific R. Co.*, 148 U. S., 562; *United States v. Denver, etc., R. Co.*, 150 U. S., 1; *Chandler v. Calumet Mining Co.*, 149 U. S., 79; *United States v. Dalles, etc., Co.*, 7 U. S. App., 297, affirmed in 148 U. S., 49.

Section 6 of the general act of 1854 provided "that any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road, and if upon the report of said engineer under oath it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State

274 in force at the time regulating railroads, thereupon it shall

be the duty of the commissioner of the general land office to issue to said company patents," etc. (Gen. Laws 1854, p. 13). By the special act of September 21st, 1866, relating to this company, it was provided that "whenever said company shall have completed and put in running order a section of twenty-five miles or more of its road beyond the point which land has been granted and drawn they may give notice of the same to the governor, whose duty it shall be to appoint some skillful engineer to examine such section of road, and if upon the report of said engineer under oath it shall appear that the said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the commissioner of the general land office to — said company certificates," etc. (Special Laws 1866, p. 33.)

It would be difficult to conceive of a case demanding more imperatively the application of the just principles running throughout all these decisions. The laws granting the lands for the construction of the road stand in the broadest and most unmistakable terms on the statute books. The road contemplated by such laws has been completed in accordance therewith many years ago. The executive officers of the State whose duty it was to ascertain the fact of construction in the performance of such duty determined such fact and issued the certificates authorized by such laws. The certificates have been located, the title to the lands acquired, and the lands have been mortgaged to secure bonds issued upon the faith in a large measure of the security thus afforded. The mortgages have been foreclosed and title passed to purchasers in good faith thereunder.

The contract between the State and the company, evidenced by the legislation in question and construction of the road, 275 is in all respects and to the fullest extent an executed contract. The transaction is completed. The State not only stood by and permitted the company to proceed with the construction of the road in the reasonable expectation of deriving the benefit of these acts, but through its executive officers recognized to the fullest extent the obligation resting upon it under such acts. It inspected the road as different sections were completed and issued certificates therefor and recognized their location in the manner provided by law. It has reaped all the benefits contemplated by such legislation. It has secured all for which it contracted. It induced by its action the fulfillment by the company of its part of the contract by performing from time to time its own obligations thereunder. In the full enjoyment of all the benefits and advantages for which it bargained, it now, at this late day, seeks to repudiate it and, while retaining its benefits, endeavors to escape its obligations and withdraw and retake the consideration with which it once parted in the utmost good faith. We have said that the State does this, but in this we are not entirely accurate. The State has never by any legislative action sought to repudiate its contract and reclaim the grant. It has never instituted any direct proceeding for the purpose of setting aside, upon any grounds known to courts of

equity, its executed contract—a contract fully performed by both parties. It is the attorney general (whose authority we deny and which in any event is extremely doubtful) who brings this simple action of trespass to try title for the purpose of setting aside a completed transaction of the State—a solemn contract which has been fully performed by both parties and which, certainly, it should not be lightly assumed that the State would undertake to set aside, in any event, without an expression of its purpose to do so in some formal mode employed for the expression of the sovereign will. He seeks to accomplish this purpose and to overturn the action of the State with respect to a long-completed transaction by a simple action designed merely for the settlement of questions of title between individuals. He does not pretend that there was any fraud in the transaction, for no one could reasonably charge that there was. He does not deny the utmost good faith upon the part either of the company or the officers of the State who were required by law to deal with the matter. He ignores and sets at naught the ancient and familiar principle of law that the action of the executive officers of the State within the apparent scope of their authority is presumed to be lawful and valid and based upon facts warranting their action. He advances, neither in his pleadings nor proof, a single ground or circumstance that would entitle any litigant in a court of equity to relief against an executed and completed transaction. It is boldly a collateral attack, without a single allegation or fact that would support even a direct proceeding, upon a completed and fully executed contract and transaction of the State government. The statutes in question and the physical existence of the railroad afford complete evidence of the fulfillment of the contract by both parties long before this suit was instituted. It was fulfilled to the satisfaction of both parties. They both regarded it as fulfilled and have acted upon it accordingly for many years. Running throughout the cases hereinbefore cited and referred to in the Supreme Court of the United States is the principle, clearly defined and often applied, that where the executive department has acted with respect to such matters the only questions that can arise are power in the officer and fraud in the party. There is no pretense that there was any fraud, and it is not possible that there could have been any, and it is not even claimed that there was any mutual mistake.

We submit with entire confidence that if the State could set aside this completed and fully executed transaction at all it 277 could only do so by a direct proceeding in an appropriate action for that purpose based upon some of the grounds known to equity jurisprudence (*Chandler v. Calumet Co.*, 149 U. S., 79, 93; *United States v. Hughes*, 11 Howard, 552). It is impossible for it to do so in a collateral proceeding of this character. Suppose, for instance, that some private person or individual had filed upon the lands in question and had then brought an action against the company for recovery of the land upon the ground that the company was not entitled to it because it had failed to construct its road within the time required by law, will any one contend that

such an action could be maintained? Would any one deny that judgment in such case must inevitably be for defendant? Yet this is precisely such an action. The fact that the State is the party plaintiff makes no difference. It is a collateral attack upon an executed contract and completed transaction of the State which can be set aside, if at all, only in a direct proceeding and appropriate action for that purpose. *G., H. & S. A. R'y Co. v. State*, 81 Texas, 572, is directly in point here. That was a suit by the State in the form of an action of trespass to try title, in which the attorney general contended upon grounds, among others, that the company having failed to construct its road within the time required by law, it had forfeited its charter and consequently its right to the lands in question, and asked judgment on that ground regardless of others. It was held that such forfeiture could be enforced, if at all, only in a direct proceeding for that purpose, and in effect that it could not be claimed in a collateral proceeding of this character. It seems to us that the principle there recognized is entirely applicable here, and that under the most favorable view of the State's case it cannot, in a collateral proceeding in the form of an action of trespass to try title, take advantage of a ground of forfeiture that should 278 be enforced, if at all, only in a direct proceeding for that purpose; and even if this were not so we contend and have endeavored to show that both the State's petition and the proof in this action are wholly insufficient to support it, inasmuch as it seeks to set aside a completed transaction and a fully executed contract of the State without any allegations of fraud, or even mutual mistake or any other ground known to equity jurisprudence, by the principles of which the State is as much bound as is any private litigant.

We submit, therefore, that the contract having been fully executed by both parties and acted on for many years and having been fully completed long ago, it cannot be set aside in the manner here sought, and could not have been at any time without some allegation and proof of fraud on the part of the company, or an entire absence of power upon the part of the executive department, whose action is attempted to be annulled, and we earnestly insist that upon no principle known to the law can the judgment be sustained.

Twelfth.

Olcott as a Bona Fide Purchaser.

The said court of civil appeals erred in overruling petitioners' fifteenth assignment of error, complaining, in effect, of the action of the court below in holding that petitioner Olcott, having taken title under the certificates, was affected with notice of their alleged invalidity under the constitution of 1869.

Statement.

See Brief, pages 21-23. See also the fifteenth ground of petitioners' motion for rehearing. The proof showed (Trans., 102, 103) that

the lands in question were mortgaged in 1866, 1870, 1872, 1875,
1877, and 1881, and the court below found as a fact (Trans.,
279 56) that petitioner Olcott purchased under foreclosure of
those mortgages in 1888, paying therefor a consideration of
\$10,508,000, and that deed was made and delivered to him January
8th, 1889. This suit was not commenced until February 3d, 1890.
The court below also concluded, as matter of law (Trans., 57), that
such sale was effectual to convey to Olcott the title and interest in
and to said lands theretofore owned by the railway company. It
also held, as matter of law (Trans., 58), that Olcott, having taken
title under the certificate, no patents having been issued, was af-
fected with notice of their alleged invalidity under the constitution
of 1869. It also found as a fact (Trans., 56) that after the location
of the lands they had been platted upon the map in use by the
general land office, and had been recognized by all the land
commissioners as the lands of the railway company, and said com-
pany had paid all taxes accruing thereon.

Authorities.

- Wimberly v. Pabst, 55 Tex., 587.
Moelle v. Sherwood, 148 U. S., 21.
United States v. Budd, 144 U. S., 154, 167.
Maxwell Land Grant case, 121 U. S., 325.
Colorado Coal Co. v. United States, 123 U. S., 307.
Chandler v. Calumet, etc., R. Co., 149 U. S., 79.
United States v. Willamette, etc., Co., 55 Fed. Rep., 711, 717.

Argument.

What we have said under the preceding ground of this application is applicable here. Olcott is as much an innocent purchaser of the lands in question as if patents had been issued. While the particular sections in suit had not been patented, many others had been. The State is as much bound by the issuance and location of the certificates and its actions in the premises as if it had issued the patents. The company had acquired an equitable title and the complete beneficial ownership of the lands. It may be true 280 that the complete legal title would not vest until the patents should issue, but the right of the State had ceased and the right of the company had vested by the issuance and location of the certificates as provided by law. This is too well settled to admit of discussion. The lands had been mortgaged by the company not only as authorized by general law, but as expressly authorized by the company's charter (Special Laws 1856, page 29). Olcott's rights as purchaser of course relate back to the various mortgages. Whatever rights vested thereunder in the holders of the bonds passed to Olcott by the foreclosure and sale to him, regardless of the form of the deed he received. The State had issued the certificates, had permitted them to be located, had recognized their location, had treated the land as belonging to the company, and had accepted

taxes accruing on it for years. It had authorized the company to mortgage the lands and to borrow money upon the faith of the security thus afforded. It had not by any legislative action sought to reclaim the land or repeal any of the laws standing upon the statute books expressly granting them, and had taken no judicial proceeding for the purpose of reclaiming the lands whereby a purchaser would have been put upon inquiry. As we have seen, the statute books of the State abounded with acts expressly granting these lands. The bondholder or purchaser could see that the road contemplated by those acts had been constructed and had been in operation for many years. There was nothing to put him on inquiry as to the time when the different sections of the road were completed. He found that the executive officers of the State, whose duty it was to determine the facts in reference to construction, had issued the certificates authorized by law. Can it be possible that he was required to look beyond this, and to institute an inquiry as to the time when the different sections were completed?

281 Can it be possible that any such burden rested upon him?

Where would he have gone for the evidence? The State had never instituted any action questioning the fact. Registration records and the court records were absolutely silent. On the other hand, he had the very highest evidence of completion in the time required by law in the certificates issued by the executive department, and located with their recognition and approval. He had also the potential evidence afforded by the existence of the statutes granting the land and by the completed and existing road contemplated thereby. It would be impossible, we submit, to conceive of a case more strongly demanding the protection of *bona fide* purchasers.

If there had been no law granting the lands, or if the grant under the terms of the statute had been doubtful, the case would be different; but the laws were explicit and the grant intended by them was absolutely beyond question. There could, therefore, be no doubt suggested to the mind of the purchaser from the reading of the statutes as to the law, and so far as the facts were concerned he found the highest evidence in the completion of the road and the issuance of the certificates by the executive department. There is no other record of the facts—indeed, no other way open to him for definitely ascertaining the facts. We submit, therefore, that the purchaser of the bonds issued by the company and secured by mortgages upon these lands, and whose rights Oleott has, was unquestionably a *bona fide* purchaser, whose rights, upon every principle of justice, the court should sustain. As was said by this court in *Wimberly v. Pabst*, 55 Texas, 587, 592:

"To the public generally a patent to land having been issued by authority of the State carries with it a high degree of faith and credit as the beginning link in the legal chain upon which all after-acquired title can securely depend. When, therefore, a subsequent

282 purchase is made upon the faith of a patent, regular upon its face, public policy requires that it should constitute an important element in the good faith of the transaction and

should turn the scale in its favor, except in cases of actual notice or when the law would impute constructive notice of some defect sufficient to defeat it."

What is here said of a patent as between private persons is equally true of the issuance and location of a certificate, as in this case, against the State. The State should not be permitted to entrap innocent persons in the manner illustrated by the judgment in this case. As was said by the Supreme Court of the United States in *Woodruff v. Trapnall*, 10 How., 190, 207, "We naturally look to the action of a sovereign State to be characterized by a more scrupulous regard of justice and a higher morality than belong to the ordinary transactions of individuals."

We commend to the court the principle and spirit running throughout the authorities cited above in support of this ground, and also refer, without repetition, to all we have said in argument respecting the effect of the action of the executive department in the premises in support of the last preceding ground of this application.

Thirteenth.

As to Estoppel.

The said court of civil appeals erred in overruling and holding not well taken petitioners' twentieth assignment of error, which in effect complained of the action of the court below in rendering judgment against petitioner Olcott, when the uncontested evidence showed that by making the grants through legislative action, accepting the construction of the road and issuing the patents, permitting them to be located, and recognizing them as valid, and permitting the company to mortgage the land and sell its bonds secured thereby, and in acknowledging the ownership of the land by the company for many years and until they had passed in the hands of innocent purchasers, the State became and was estopped to claim them in this action against such innocent purchaser.

Statement.

See Petitioners' Brief, pages 27, 28, and the statement under the last preceding ground of this application.

Authorities.

- Johnston v. Smith*, 21 Tex., 722, 729, 730.
- San Antonio v. Jones*, 28 Tex., 33, 34.
- State v. Morris & Cummings*, 73 Tex., 440.
- 2 *Morawetz on Corporations*, 1029.
- Woodruff v. Trapnall*, 10 How., 190.
- Carver v. Jackson*, 4 Peters, 1, 87.
- United States v. Willamette, etc.*, Co., 54 Fed. Rep., 807, 811.
- Cohn v. Barnes*, 5 Fed. Rep., 326.
- State v. Milk*, 11 Fed. Rep., 397.
- Pengra v. Munz*, 29 Fed. Rep., 830.
- Commonwealth v. Andre*, 3 Pick. (Mass.), 224.
- Commonwealth v. Pejepscot*, 10 Tyng. (Mass.), 154.

tioner railway company was not entitled to the grant for the construction of its line to San Antonio. Petitioner railway company in due time presented to the said district court its application to remove this cause into the Federal court upon the ground, in effect, that the suit was one arising under the Constitution and laws of the United States, claiming that petitioner had proceeded under its charter and the acts relating to it to construct, and had constructed prior to the adoption of the constitution of 1869, an important part of its line at large expense, and had acquired thereby and under the laws above mentioned a contract and vested right to the land grant in question, and that the constitution of 1869, pleaded and referred to in the State's petition, impaired the obligation of such contract, in violation of section X, article 1, of the Constitution of the United States, and deprived petitioner railway company of property without due process of law, in violation of section 1 of the fourteenth amendment of said Constitution; but said application to remove said cause into the circuit court of the United States was by said district court of Brewster county denied and refused, and said district court proceeded with the trial of the same; which action and ruling of said district court was, on appeal therefrom, as aforesaid, by petitioner railway company, affirmed by the said court

of civil appeals by the judgment herein complained of,
249 whereby petitioners say that said court decided against the title, right, privilege, and immunity so specially set up and claimed in said suit by petitioners under the Constitution and statutes of the United States and the commission held and authority exercised under the United States.

Your petitioners refer to the assignment of errors filed herewith and pray that the same be considered for the purposes of this petition as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said court of civil appeals in and for the fourth supreme judicial district of the State of Texas, which now has the record in said suit, for the removal of said cause into the Supreme Court of the United States, to the end that the errors in said judgment and in the proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings, and papers in said cause, duly authenticated, may be sent to the said Supreme Court of the United States.

T. D. COBBS,
J. P. BLAIR,
JAS. A. BAKER,
R. S. LOVETT,

*Attorneys for the Galveston, Harrisburg & San Antonio
Railway Company, E. P. Hill, and W. N. Shaw, Petitioners.*

Allowed by—

J. H. JAMES,
*Chief Justice of the Court of Civil Appeals in and for
the Fourth Supreme Judicial District of Texas.*

250 [Endorsed:] No. 385. The Galveston, Harrisburg & San Antonio Railway Co. et al. vs. The State of Texas. Petition to the United States Supreme Court for writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jun-24, 1897. H. E. Hildebrand, clerk.

251 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the court of civil appeals in and for the fourth supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the fourth supreme judicial district of Texas, before you or some of you, being the highest court of the said State in which a decision could be had in said suit between The Galveston, Harrisburg & San Antonio Railway Company, appellant, and The State of Texas, appellee, and E. P. Hill and W. N. Shaw, as sureties, on the appeal bond of said appellant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, a manifest error has happened, to the great damage of the said The Galveston, Harrisburg & San Antonio Railway Company and E. P. Hill and W. N. Shaw, the sureties on its appeal bond, as by their complaint appears, we, being willing that error, if any 252 hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[The seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,

*Clerk of the Circuit Court of the United States
for the Western District of Texas,
By — — —, Deputy.*

Allowed by—

J. H. JAMES,

*Chief Justice of the Court of Civil Appeals of the
Fourth Supreme Judicial District of Texas.*

253 [Endorsed :] G., H. & S. A. R'y Co. *et al.*, appellant-, vs. The State of Texas, appellee. Original writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jun- 24, 1897. H. E. Hildebrand, clerk.

254 UNITED STATES OF AMERICA, *ss.*:

To The State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals in and for the fourth supreme judicial district of Texas, wherein The Galveston, Harrisburg & San Antonio Railway Company, E. P. Hill, and W. N. Shaw are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

J. H. JAMES,
*Chief Justice of the Court of Civil Appeals for the
Fourth Supreme Judicial District of Texas.*

255 Came to hand on the 5th day of July, 1897, and executed on the 6th day of July, 1897, by delivering, at Austin, Texas, in my district, to C. A. Culberson, governor of the State of Texas, and to M. M. Crane, attorney general of the State of Texas, each in person, a true copy of this writ.

R. C. WARE,
*U. S. Marshal,
By FRED. PECK, Deputy.*

Serving 2 copies of citation, \$4.00.

256 [Endorsed :] Galveston, Harrisburg and San Antonio, Railway Company, plaintiff in error, vs. The State of Texas, defendant in error. Citation on writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Jul- 10, 1897. H. E. Hildebrand, clerk.

Endorsed on cover : Case No. 16,634. Texas court of civil appeals, 4th supreme judicial district. Term No., 421. The Galveston, Harrisburg & San Antonio Railway Company and E. P. Hill and W. N. Shaw, plaintiffs in error, vs. The State of Texas. Filed July 22d, 1897.

No. 406.

36-

FILED,
OCT. 11 1897
JAMES H. MCKENNEY
CLERK

Motion by D. C. to advance
Filed Oct. 11, 1897.

In the Supreme Court of the United States,

WASHINGTON, D. C.

OCTOBER TERM, 1897.

No. 406.

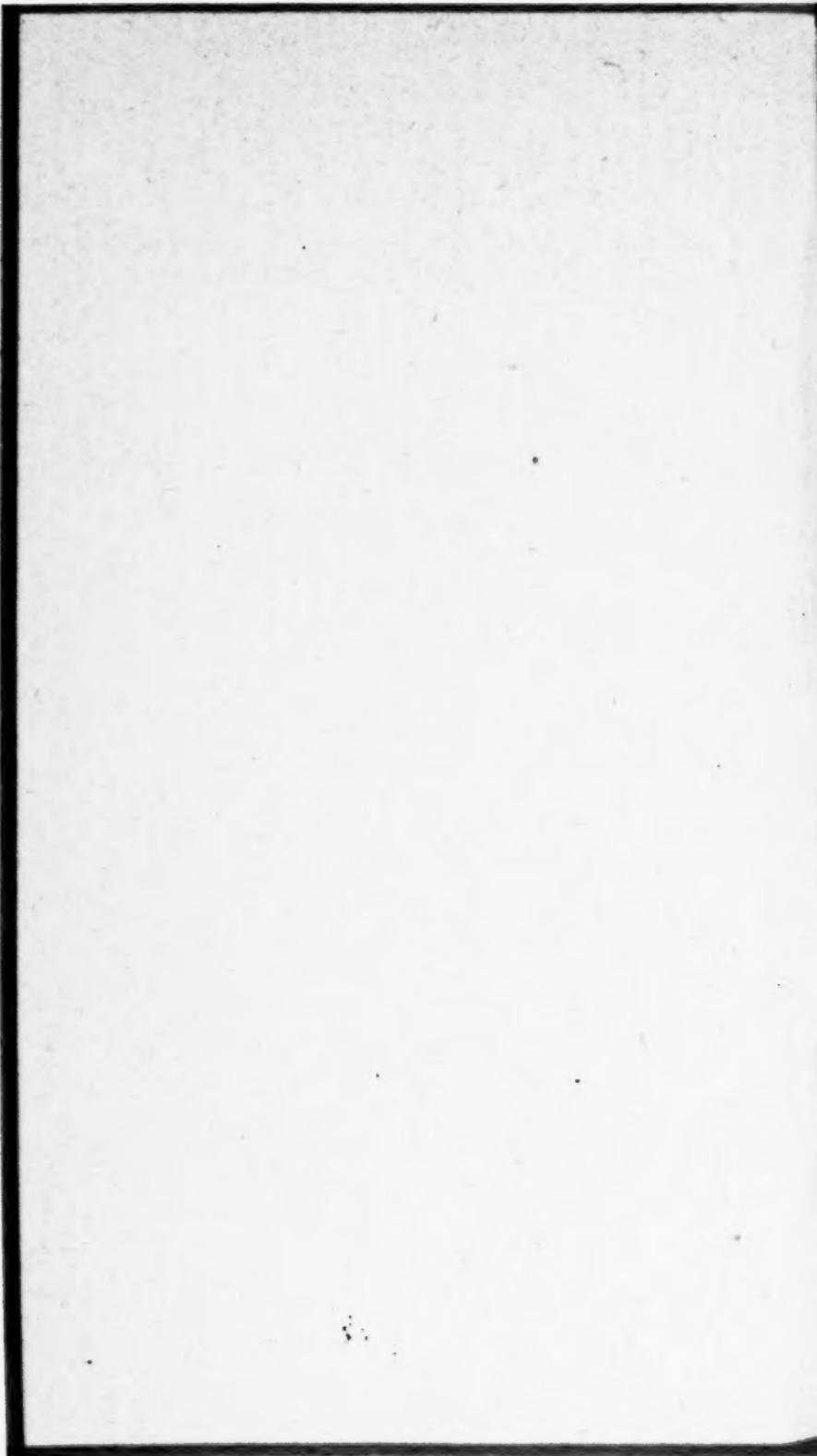
HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,
FREDERICK P. OLCOTT, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.



In the Supreme Court of the United States,

WASHINGTON, D. C.

OCTOBER TERM, 1897.

No. 406.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,
FREDERICK P. OLcott, ET AL., PLAINTIFFS IN ERROR,
vs.
THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

To the Honorable, The Supreme Court of the United States:

The controversy in this suit is over sixteen sections of land of six hundred and forty acres each, claimed by the State of Texas, aggregating something more than ten thousand acres. The State won the case in the trial court. It was appealed to the Court of Civil Appeals and affirmed, and writ of error denied by the Supreme Court of the State. As indicated the State of Texas is a party to the suit. The State of Texas, therefore, defendant in error, now, by its Attorney-General, moves the court to advance said cause on the docket of this court, and set same down for hearing ~~not later than the first of December, 1897~~ *for November 1897, or as soon thereafter as practicable* for hearing.

W. W. Clew..... Attorney-General.
Attorney for State of Texas, Defendant in Error.

The Plaintiffs in Error,.....
~~admit all of the allegations of the complaint, and hereby waive the issuance of notice and service thereof, and respectfully ask that the motion be granted, and the case advanced and set down for hearing as prayed for.~~

Baker, Ruth, Baker, Youett, *R.S.*
Attorneys for Defendants in Error.

JAN 12 1898

MURKIN - MCKINNEY

1077

~~Argued before the Supreme Court of the United States.~~

OCTOBER TERM, 1897.

Filed Jan. 12, 1898.

BOSTON AND TEXAS CENTRAL RAILWAY COMPANY,
FRDERICK P. OLcott, W. D. CLEVELAND
and C. LOMBARDI,

Plaintiffs in Error.

THE STATE OF TEXAS.

In Error to the Court of Civil Appeals for the Second
Supreme Judicial District of the State of Texas.

Brief and Argument for Plaintiffs in Error.

JAMES A. BAKER,
R. S. LOVETT,

Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 406.

HOUSTON AND TEXAS CENTRAL
RAILWAY COMPANY, FREDERIC
P. OLcott, W. D. CLEVELAND
and C. LOMBARDI,

Plaintiffs in Error,

VS.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL DIS-
TRICT OF THE STATE OF TEXAS.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

Statement.

This suit was instituted in the District Court of Nolan County, Texas, on February 3d, 1890, by the State of Texas, through her Attorney-

General, to recover of the Houston and Texas Central Railway Company, Frederic P. Olcott and George E. Downs sixteen sections of land of 640 acres each, located in that county by virtue of certificates issued by the State of Texas to the Houston and Texas Central Railway Company. It was alleged, in effect (Record, 1-5), that the State owned and was entitled to the possession of the lands sued for, and that the certificates described in the petition were issued to the Houston and Texas Central Railway Company by the Commissioner of the General Land Office of Texas without authority of law; that at the time of the construction and completion of the road for which they were issued there was no law, general or special, in force in the State of Texas authorizing or permitting their issuance, and that the action of the Commissioner of the General Land Office in issuing and delivering them, and permitting them to be located, and allowing the lands to be surveyed thereunder, and in receiving and filing the field-notes in the General Land Office of the State, was wholly without authority of law and in plain violation of the Constitution and laws of the State in force at the time. It was also

alleged that some of such certificates were issued for the construction of sidings and that there was no law authorizing the issuance of certificates for any such purpose; and it was also alleged that they were located in the territory reserved by an act passed May 2, 1873, for the location of certificates issued to the Texas and Pacific Railway Company; but these latter allegations, in view of the issues upon which the case was determined, are not material. It appears from the State's petition (Subdivision 7) that the certificates were a part of those issued for the construction and completion of about ninety-four miles of the main track and about two and a half miles of side-tracks of that part of the company's railway extending from Brenham to Austin.

While the suit is for the recovery of only sixteen sections of land, it affects the title to the entire grant of sixteen sections made by the State of Texas to the Houston and Texas Central Railway Company for each mile of that part of the western branch of that company's road extending from Brenham to Austin, amounting, in the aggregate, to about 980,000 acres. The defendant George E. Downs disclaimed

(Record, p. 28), and on such disclaimer was discharged by judgment of the District Court (Record, p. 34).

The nature of the suit and the main issues involved before this Court may be briefly summarized as follows: The State seeks to recover lands granted to the railway company as an inducement to and in consideration of the construction of its railroad. The grounds of recovery substantially are that the State, acting through its Governor and its Land Department, made a mistake many years ago when it considered that the railway company was entitled, under its legislative charter, and the amendments thereto, and the general laws of the State on the subject, to receive the land certificates in question for the portion of the railroad concerned, because it claimed that whatever right to State aid in land the railway company might have had under its charter or the general laws for the construction of such road was destroyed by the provision of the Constitution of 1869, which, it is claimed, repealed all laws granting such lands. The railway company and its vendee answer this in effect that under its charter and the amendments thereto, and the general laws, it had a contract

right to receive the lands which it had earned by the construction of its railroad which could not be impaired and its vested right to such lands destroyed by the Constitution of 1869 without contravening the Constitution of the United States. The case in further detail is as follows:

Acts Incorporating the Company.

The Houston and Texas Central Railway Company was incorporated under the name of the "Galveston and Red River Railway Company" by a special Act of the Legislature of Texas, approved March 11th, 1848, and which is printed in full in the appendix (*post*, p. I.). By that act (Section 2) the company was "invested with "the right of making, owning and maintaining a "railway from such point on Galveston Bay, or its "contiguous waters, to such point on Red River "between the eastern boundary line of Texas and "Coffee Station, as the said company may deem "most suitable, *with the privilege of making, own-*"
"ing and maintaining such branches to the railway "
"as they may deem expedient." By the act of incorporation the company was invested "with "capacity to make contracts, to have succession "and a common seal, to make by-laws for its gov-

"ernment, and in its said corporate name to sue
"and be sued, to grant and to receive, and, gen-
"erally, to do and perform all such acts and things
"as may be necessary or proper for or incident to
"the fulfillment of its obligations or the mainte-
"nance of its rights under this act and consistent
"with the provisions of the Constitution of this
"State."

The original act of incorporation was amended and supplemented by another special act approved February 14th, 1852 (*post*, p. VI.-XVIII.), by Section 14, of which (*post*, p. XIV.) there was granted to said company eight sections of land of 640 acres each for every mile of railway completed and made ready for use; and provision was made for the inspection of the road from time to time by the State Engineer as sections of five miles thereof should be completed, and for the issuance of certificates for the lands thus granted, and for the location of such certificates upon the public domain of the State, the survey of the land, the return of the field notes and the issuance of patents. It was provided in Section 16 that the lands should not be donated unless the company should commence the construction of its road within two years, and complete at

least ten miles thereof within three years from the passage of the act ; and, by Section 17, that its charter should become null and void unless the company should commence the construction of its road within five years and complete twenty miles thereof within six years from the passage of the act.

It is to be observed that the land grant made by this act was not confined to the main or any particular line of the company, but extended, without restriction, to all lines it should construct, which, of course, included branches, since by the original act of incorporation the company was invested "with the privilege of "making, owning and maintaining such branches "to the railway" as it should deem expedient.

By another special act, approved February 7th, 1853 (*post*, p. XVIII.), the preliminary action of the incorporators in commencing the survey and grade of the railway at the City of Houston was confirmed ; and by Section 2 *the company was "further authorized and empowered "to extend said railway to the City of Galveston, "and also to make and construct, simultaneously "with the main railway described in the original "acts establishing said company, a branch thereof*

"towards the City of Austin under the same re-
"strictions and stipulations provided in said
"original act," etc.

**The First General Law Granting Lands
to Encourage the Construction of Rail-
roads.**

On January 30th, 1854, the Legislature passed a general law entitled "An Act to encourage the construction of railroads in Texas by donations of land" (*post*, p. XIX.), which was the first general law passed by Texas granting lands to encourage the construction of railroads. Section 1 of the act provided :

*"That any railroad company chartered
"by the Legislature of this State, hereto-
"fore or hereafter constructing within the
"limits of Texas a section of twenty-five
"miles or more of railroad, shall be entitled
"to receive from the State a grant of sixteen
"sections of land for every mile of road so
"constructed and put in running order."*

By Section 12 of the act (*post*, p. XXVIII.) the grant thereby made was limited as follows : That it should not extend to any company receiving from the State a grant of more than sixteen sections, nor to any company for more

than a single track with the necessary turnouts; that any company then entitled to receive a grant of eight sections of land per mile for the construction of any railroad, and which accepted the provisions of that act, should not be entitled to receive any grant of land for any branch road; that the act should not be so construed as to give to any company then entitled to receive eight sections of land more than eight additional sections; that no company should receive any donation of benefit under the act unless it should construct and complete at least twenty-five miles of the road contemplated by its charter within two years after the passage of the act; that the donation should be discontinued in every instance where the company should not construct and complete at least twenty-five miles of the road contemplated by its charter each year after the construction of the first twenty-five miles, that the "proviso herein contained" should not extend to any railroad the terminus of which was not fixed on the Gulf coast, the bays thereof or on Buffalo Bayou, which "proviso" was only with respect to the time within which certain construction was required (*Quinlan vs. H. & T. C. Ry. Co.*, 89 Tex., 356, 373); that the certifi-

cates issued under the provision of the act should not be located upon any lands surveyed or titled previous to the passage of the act, and that the act should continue in force for the term of ten years from the time it should take effect, and no longer. By a supplemental act (*post*, p. XXX.), approved the same day, it was provided that no company availing itself of the provisions of the act thus supplemented should receive more than sixteen sections to the mile "by virtue "of said act or any proviso therein contained," and that no company benefited by said act should receive any donation of land under its charter or under the act thus supplemented for any work not done within ten years after the passage of the act.

Railroad companies entitled to land under this act were required by Section 3 to cause the land to be surveyed into sections of 640 acres each, and in square blocks of not less than six miles, unless prevented by previous surveys or by navigable streams, which survey should be delineated upon a map or maps, the even and odd sections being differently colored and regularly numbered from one upward to the full number contained in the block, and the field-

notes of the survey or maps should be deposited with the Commissioner of the General Land Office. Section 6 provided :

"That any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road, and it, upon the report of said engineer under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands, or any part thereof, shall not have been surveyed at the time said section is completed, then it shall be the duty of said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed, whereupon said company may apply to the District Surveyor of any land district in this State to survey any quantity of vacant land subject to location and entry in such district not to exceed twice

" the quantity of certificates so issued, which
" surveys shall be made, numbered and col-
" ored as directed in the third section of this
" act; and, upon the return of the field-notes
" and map or maps of such surveys to the
" General Land Office and the certificates
" so issued, it shall be the duty of the Com-
" missioner to issue to said company patents
" for the odd sections of said surveys, pro-
" vided that, in case the certificates are not
" applied for before the completion of any
" section of road, it shall not be necessary to
" deposit with the treasurer a bond as re-
" quired in the second section of this act."

Section 11 provided that all the alternate or even-numbered sections of land surveyed in pursuance of the provisions of the act should be reserved to the use of the State, and should not be liable to locations, entries or pre-emption privileges until otherwise provided by law.

This act immediately stimulated railroad construction in the State. While the operation of the act was, by its provisions, limited to ten years, and the benefit of the grant was restricted to work done within ten years, yet before the expiration of that period, and by a general act passed January 11th, 1862, entitled "An Act for the relief of railroad companies"

(*post*, p. LIV.), as well as by another general act of the same date, entitled "An Act for "the relief of companies incorporated for the "purpose of internal improvement by allowing "them further time for performance on account "of the pending war" (*post*, p. LI.), the benefits of the act and the time for the construction of work required by it were extended until two years after the close of the then prevailing war; that is to say, until August 20th, 1868, the war having ended in Texas August 20th, 1866 (*The Protector*, 12 Wall, 702; *Grigsby vs. Peak*, 57 Tex., 142). Before that date, however, the Legislature passed an act, which was approved November 13th, 1866, entitled "An Act for the benefit of railroad companies" (*post*, p. LXI.), whereby the grant of sixteen sections of land to the mile to railroad companies was extended under the same restrictions and limitations theretofore provided by law for ten years after the passage of said act, or, say, until November 13th, 1876. Sec. 43, Art. XII., of the Constitution of 1869, provided: "The statutes of limitation of "civil suits were suspended by the so-called 'Act "of 'Secession of the 28th of January, 1861, and "shall be considered as suspended within this

"this State until the acceptance of this Constitution by the United States Congress." This Court had occasion to consider, in *Davis vs. Gray*, 16 Wall., 203, the two acts of January 11th, 1862, and the act of November 13th, 1866, with respect to the extension thereby of the laws of Texas theretofore in force granting lands to railroad companies, and held that by such acts the land-grant laws of the State were in force when the Constitution of 1869 was adopted (see to same effect *Railroad vs. Commissioners*, 36 Texas, 382).

It may be observed here that at the time of the passage of the general act of January 30th, 1854, the Houston and Texas Central Railway Company was, by Section 14 of the special act of February 14th, 1852, amending its charter, entitled to eight sections of land for each mile of road it should construct, which was granted without restriction respecting the lines to be constructed, and which, therefore, extended to branch as well as main lines, since the company, under Section 2 of its original act of incorporation (*post*, p. I.), was invested with the privilege of making, owning and maintaining such branches as it should deem proper, and

was by Section 2 of the special act of February 7th, 1853 (*post*, p. XIX.), expressly authorized to construct a branch to the City of Austin. The company could not, however, take the grant of sixteen sections per mile made by the general act of 1854, and at the same time take eight sections per mile for its branches, since the general act provided that any company then entitled to eight sections per mile, and accepting the provisions of that act, should not be entitled to receive any land for branch roads. This situation gives significance to a provision of the special act of January 23d, 1856 (*post*, p. XXXI.), which we shall next consider.

Further Special Legislation Relating to the Company.

On January 23d, 1856, the Legislature passed a special act entitled "An Act for the relief of "the Galveston and Red River Railway Com- "pany and supplemental to the several acts in- "corporating said company" (*post*, p. XXXI.), by which, after providing that the company should have six months after the 30th day of January, 1856, to complete the first twenty-five miles of its road, commencing at the City of

Houston, it was declared that "said company shall
 " be entitled to the rights, benefits and privileges
 " granted by an act approved January thirtieth,
 " eighteen hundred and fifty-four, entitled 'An Act
 " 'encourage the construction of railroads in
 " 'Texas by donations of land,' " upon the comple-
 tion of said twenty-five miles within said six
 months, etc., upon certain conditions, viz.: (1)
 That it should maintain its principal office and
 keep its records on its line of road; (2) that a ma-
 jority of its directors should reside in the State,
 and that its meetings for election of directors and
 officers should be held in the State; (3) that it
 should complete its main line to a certain point
 before commencing the branch road; (4) that it
 should submit itself to the general act of Fe-
 bruary 7th, 1853, regulating railroads; and (5)
 that it should yield all general branching privi-
 leges, "*except such as were expressly granted by*
" the provisions of its charter to certain points" (i.
 e., to Austin under the act of February 7th, 1853).
 Section 5 of the act reading as follows:

"That said railroad company, in accept-
 " ing the benefits of this act, shall yield all
 " general branching privileges, except such
 " as are expressly granted by the provisions

" of its charter, to certain points, and shall
" be required to spend only so much of its
" capital stock upon any branch as shall be
" expressly subscribed to such branch, and
" shall not spend upon its trunk any moneys
" subscribed to any branch, and shall be re-
" quired to complete its main trunk to the
" point on Red River contemplated in its
" charter, or to such point of intersection be-
" tween said road and some other road run-
" ning from the northern or eastern bound-
" ary of Texas toward El Paso as shall be
" agreed upon between the directors of said
" companies" (p. XXXIV.).

Said act also provided (Section 3) that said company might assign certificates for lands granted it; that it should be authorized to borrow money from time to time for the construction of its railway and secure the same by pledging and mortgaging its property, real, personal and mixed, and might issue bonds therefor, and should have the right, after the location and survey of the lands granted it, or any part thereof, to mortgage, hypothecate or sell any part of said lands.

By another special act, approved September 1st, 1856 (*post*, p. XLVI.), the name of the Galveston and Red River Railway Company was

changed to "The Houston and Texas Central Railway Company," and it was also provided that the failure of the company to complete the second section of its road within one year after the completion of the first section should not work a discontinuance of the benefits of the general act of January 30th, 1854, or of any other general or special laws relating to railroads.

By another special act passed February 4, 1858 (*post*, p. XLVIII.), it was, among other things, provided that the failure of the company to complete the third section of its road by July 30th, 1858, as required by prior laws, should not work a discontinuance of the benefits of the act of January 30, 1854, or of any other laws in reference to railroads if the company should complete the third section by July 30th, 1859, and that on the completion of subsequent sections of twenty-five miles annually after July 30th, 1859, or fifty miles every two years, "said company shall be entitled to sixteen sections of land per mile contemplated in said last-mentioned act for each section so completed."

By another special act, approved February 8th, 1861 (*post*, p. LI.), any default that may have existed with respect to construction was

waived and the company was given until January 30th, 1863, in which to perform such work, but before the extension thus given had elapsed the war commenced.

The War Period.

At the beginning of the war in 1861 the company had completed and had in operation its main line as far as Milligan, about eighty miles from the terminus on Buffalo Bayou at Houston (Record, 73). Construction, of course, was suspended during the war. On January 11th, 1862, the Legislature passed two general acts—one entitled “An “Act for the relief of railroad companies” (*post*, p. LIV.), and the other entitled “An Act for “the relief of companies incorporated for the pur-“pose of internal improvement by allowing them “further time for performance on account of the “pending war” (*post*, p. LII.), the effect of which was to continue in force all laws granting lands to railroad companies and to extend the time within which they were required to construct certain parts of their lines until two years after the close of the war (Davis vs. Gray, 16 Wall., 203). Both of these acts provided—

the one first mentioned in Section 4, and the other in Section 2—in substantially the same language, that :

“ The president and directors of the
“ Houston and Texas Central Railway Com-
“ pany shall, before the provisions of this
“ act shall extend to the benefit of said com-
“ pany, pass a resolution restoring the
“ original *bona fide* stockholders of said
“ company—those who have paid for stock
“ —to all the rights, privileges and immu-
“ nities to which they were entitled previous
“ to, and of which they were divested by,
“ the sale of said road to W. J. Hutchins
“ and others, and shall forward to the Gov-
“ ernor of the State a copy of said resolution
“ signed by the president and counter-
“ signed by the secretary or treasurer un-
“ der the seal of said company; and said
“ company shall not have the power to re-
“ peal said resolution so as to defeat the
“ object of this act; provided that, if said
“ *bona fide* stockholders should fail to pay
“ into the treasury of said company ten
“ per cent. upon their said stock on or before
“ the expiration of the extension of time pro-
“ vided in this act for railroad companies to
“ fulfill their charter obligations to the State,
“ then and in that case said stockholders
“ shall forfeit all their rights, privileges and
“ property interests as stockholders in said
“ road ” (*post*, pp. LIII. and LVI.).

The resolution required by these acts was duly passed by the company (Record, pp. 29, 32, 80). The effect of these acts, as we have already seen, was to continue in force the general act of January 30th, 1854, as well as all other laws granting lands in aid of the construction of railroads, and extend the time for all such construction until two years after the close of the war, or, say, until August 20th, 1868 (the war ending in Texas August 20th, 1866). Before the expiration of that time the general act of November 13th, 1866, already referred to, entitled "An Act for "the benefit of railroad companies" (*post*, p. LXI.), was passed, whereby the grant of sixteen sections per mile by prior laws was continued for ten years from that date, or, say, until November 13th, 1876. The act also provided that all tap roads over twenty-five miles long should be entitled to the benefits of the act. The District Judge, in this case, held that this act was not in accordance with the Constitution of Texas, and was upon that ground void, but pending the appeal in the Court of Civil Appeals the Supreme Court of Texas held in *Quinlan vs. H. & T. C. Ry. Co.*, 89 Texas, 356, that the act was valid.

Special Act of September 21st, 1866.

If there was any doubt before respecting the right of this company to lands for the construction of its western division to Austin, it was removed by a special act approved September 21st, 1866 (*post*, p. LVIII.). By this act a specific grant was made to said company "of sixteen " sections of land of 640 acres each for every mile " of road it has constructed or may construct and " put in running order in accordance with the " provisions of its charter;" but it was provided that the lands theretofore received under the general act of January 30th, 1854, should be deducted from the grant thus made, though the certificates issued therefor should "be included " in the terms, benefits and conditions of this act " as if issued by virtue of its provisions." It was also provided that the company should construct and put in running order an additional section of twenty-five miles of its road within one year from January 1st, 1867, or fifty miles within two years from that date, and that it should be completed to Bryan by the first day of September, 1867. Provision was made by the act for the inspection of the road from time

to time as sections should be completed and for the issuance and location of certificates and the survey of the lands thereby granted.

The Washington County Railroad.

The Washington County Railroad Company was incorporated by a special act approved February 2d, 1856, (*post*, p. XXXVI.), and by Section 3 of the act the company was invested "with the right of locating, constructing, owning and maintaining a railway commencing at "such point on the trunk of the Galveston and "Red River Railroad as said corporation shall "deem most suitable, crossing the Brazos River "within the limits of Washington County, and "then running by the most suitable and direct "line to Brenham in said county." It was also, by Section 2, invested "with capacity in said "corporate name to make contracts, to have succession and a common seal, to make by-laws for "the government and regulation of the said "company, to sue and be sued, to plead and be "impleaded, to grant and receive, and, generally, "to do and perform all such acts as may be "necessary and proper for or incident to the "fulfillment of its obligations," etc.

The Washington County Railroad Company, in pursuance of its act of incorporation, was organized, and thereafter constructed and put in operation a line of railroad from a junction with the Houston and Texas Central Railway at Hempstead; thence directly toward the City of Austin to Brenham, a distance of about twenty-five miles (Record, p. 30).

Some time prior to August 29th, 1868, the exact date not being shown by the record, the Houston and Texas Central Railway Company purchased the Washington County Railroad at foreclosure sale. On the date last mentioned the convention, which assembled in pursuance of the reconstruction acts of Congress to frame a new Constitution for the State, and which did frame the constitution subsequently adopted and known as the "Constitution of 1869," passed an ordinance (*post*, p. LXIII.), reciting, among other things, that the Houston and Texas Central Railway Company had become the owner, by purchase, of the Washington County Railroad; that both of said companies were indebted to the State for sums borrowed from the special school fund; that the Houston and Texas Central Railway Company desired to extend the

Washington County branch to the City of Austin as soon as it could be done, and to extend its main line to Red River; and that it was desirable that the bonds of said company given for the school-fund loan should be exchanged for bonds of the Houston and Texas Central Railway Company secured by a deed of trust referred to; and it was then, among other things declared, "*that the Washington County Railroad is hereby made and declared to be a branch of the Houston and Texas Central Railroad, and shall henceforth be known and called the 'Western Branch of the 'Houston and Texas Central Railway,' and shall be controlled and managed by said Houston and Texas Central Railway Company, and the Houston and Texas Central Railway Company shall have the right to extend said western branch of their road from the Town of Brenham, in Washington County, to the City of Austin, in Travis County, by the most eligible route as near an air line as may be practicable.*"

The same convention also passed, on December 23rd, 1868, a "declaration for the relief of the Houston and Texas Central Railway Company," (*post*, p. LXVII.), which provided that the company should not suffer "any forfeiture

" of any rights secured to it by existing laws by
 " reason of the failure of said company to con-
 " struct and put in running order their said rail-
 " way to the Town of Calvert, in Robertson
 " County, by the first day of January, A. D.
 " 1869, as required by the act of the 21st of Sep-
 " tember, A. D. 1866, provided said railway shall be
 " constructed and put in good running order for
 " the use of the public, to the said Town of
 " Calvert, by the first day of April, A. D. 1869."

Subsequently the Constitution framed by the convention which passed the above ordinance was submitted to a vote of the people, as required by the reconstruction acts of Congress, at an election held November 30th to December 3rd, 1869, and was accepted by Congress by an act of March 30th, 1870 (16 Stats. at Large, Chap. 39, p. 80), and took effect on that day, as decided in *Grigsby vs. Peak*, 57 Tex., 142, or on the date of its adoption, December 3, 1869, as decided in *Peak vs. Swindel*, 68 Tex., 242. Section 6, Article X., of that Constitution, reads as follows:

" The Legislature shall not hereafter
 " grant lands to any person or persons, nor
 " shall any certificates for land be sold at
 " the Land Office, except to actual settlers

" upon the same, and in lots not exceeding
" one hundred and sixty acres."

On August 15th, 1870, the Legislature of Texas passed a special act entitled "An Act for "the relief of the Houston and Texas Central "Railway Company" (*post*, p. LXVIII.), which recites substantially the same matters as were recited in the declaration of the Constitution of 1868, above stated, and provided in Section 1 as follows :

" That the Washington County Railroad
" is hereby made and declared to be, to all
" intents and purposes in law, a part of the
" Houston and Texas Central Railway,
" and shall be under the control and
" management of the Houston and Texas
" Central Railway Company in like manner
" as every other part of said railway, and
" the Houston and Texas Central Railway
" Company shall have the right to build and
" extend the part of its railway heretofore
" known as the 'Washington County Rail-
" road' from the Town of Brenham, in the
" county of Washington, to the City of
" Austin, in the County of Travis, by the
" most eligible route to be selected by
" engineers of the company; and the said
" company shall also have the right to
" build a branch road diverging from the

" main trunk at some point in Navarro
" County and striking Red River at such
" point as will enable such railway company
" to make a connection with any railroad
" which may be built to said river from the
" northward; and the said Houston and
" Texas Central Railway Company, by rea-
" son of the construction of said railway
" from the Town of Brenham to the City of
" Austin, and by reason of the construction
" of said branch from Navarro County to
" Red River, shall have and enjoy all the
" rights, privileges, grants and benefits that
" are now, or may at any time hereafter, be
" secured to any railroad company in the
" State of Texas by any general law of the
" State, and shall be subject, in respect of
" said railway and said branch, to all the
" duties and responsibilities imposed upon
" the said Houston and Texas Central
" Railway Company by its charter and by
" other laws of the State."

Section 4 reads as follows :

" No forfeiture of any of the rights or
" privileges secured to it by existing laws
" shall be enforced against the Houston and
" Texas Central Railway Company by rea-
" son of its failure to comply with the con-
" ditions as to construction imposed by the
" first section of the act of the 21st of Sep-
" tember, A. D. 1866, entitled 'An Act

" " granting lands to the Houston and Texas
" " Central Railway Company; but the
" said company shall have and enjoy all
" the rights and privileges secured to it by
" existing laws the same as if the conditions
" embraced in the first section of the said
" act of the 21st of September, A. D. 1866,
" had been in all respects complied with,
" provided that the land grant to said com-
" pany shall cease unless the said company
" shall complete their main trunk east of
" the Brazos River to Richland Creek in
" Navarro County within twelve months
" from the first day of October, A. D. 1870,
" and shall also complete their road to the
" City of Austin within two years after the
" passage of this act."

The company completed its road to the City of Austin on the 25th day of December, 1871 (see 20th Finding of Fact by the District Court, Record, p. 31), and completed its main line to Richland Creek on the 26th day of September, 1871 (see 14th Finding of Fact by the District Court, Record, p. 30).

On May 17th, 1871, the Legislature passed a joint resolution proposing an amendment to Section 6, Article X., of the Constitution of 1869, above quoted, so as to authorize the Legislature to grant lands for purposes of internal improve-

ment (*post*, p. LXXVI.). This amendment was adopted by a vote of the people at an election held in November, 1872, and on March 19th, 1873, the Legislature, by a joint resolution, ratified the amendment (*post*, p. LXXVII.), as provided by the Constitution of 1869 in reference to amendments. Thereupon the Legislature of Texas passed many special laws granting lands to railroads, which laws, as well as all special laws herein referred to, by stipulation of counsel (Record, p. 49) may be looked to by the Court with the same effect as if contained in the record (G. H. & S. A. vs. State, 81 Tex., 572), and afterward, on March 16, 1867, the Legislature passed another general law granting sixteen sections of land per mile in aid of the construction of railroads (*post*, p. LXXIX.).

It was admitted by the State in writing at the trial "that the defendants paid taxes on the "lands sued for continuously since they were "located and up to the present time," and "that "the defendants paid all the fees of locating and "surveying the said lands sued for, as well as for "the same number of alternate sections known as "the even numbers for the public free-school "fund" (Record, p. 49). Application for the inspection of the Austin line, as well as for the

main line to Corsicana, was made by the company to the Governor February 9th, 1872 (Record, p. 56), and on the 12th of the same month the Governor appointed John W. Glenn to inspect the road (Record, pp. 56, 57), and the report of Glenn showing the completion of the road was made February 21st, 1872 (Record, pp. 57-63). The lands were placed on the maps of the General Land Office and always recognized as the company's land (see Map, Record, p. 82, 83).

Defendant's Answer.

The Houston and Texas Central Railway Company and Frederic P. Olcott, in answer to the State's petition, first pleaded in abatement (Record, pp. 6-10) that the lands sued for, with all other property of the Houston and Texas Central Railway Company, were then in the custody of the United States Circuit Court for the Eastern District of Texas, through its Receiver, Charles Dillingham; that the jurisdiction of said Circuit Court over the subject matter was exclusive, and that the District Court of Nolan County was, therefore, without jurisdiction to entertain the State's action; and also

pledged in abatement that the Receiver of the Federal Court (Dillingham) was a necessary party to the action. To the merits they pleaded the general issue and other matters, only some of which it is necessary to notice in this connection. Without attempting to state the various matters set forth in the answer it is sufficient in this connection to say that the defendants named set up (Record, pp. 15-23) the special acts incorporating and relating to the railway company and the general laws hereinbefore mentioned, and alleged in effect that the company proceeded with the construction of its road in pursuance of said acts and in reliance upon the grants thereby made, and completed its entire road "by virtue of its charter and the " general and special laws passed by the Legislature of the State of Texas and became entitled " to said land grants and certificates;" that the road was inspected from time to time by engineers appointed by the Governor, as required by said acts, and certificates for the lands granted were issued as the several sections were completed; that they were located at the time by the company at large expense; that the executive officers of the State charged with the admin-

istration of such laws had issued the certificates and always recognized the right of the company to the lands located by virtue thereof; that all taxes assessed by the State upon the land subsequent to such locations had been paid by the company; that with the consent of the State the company had, years before, mortgaged the land to secure bonds given for money used in the construction and equipment of its lines of railway; that such mortgages had been foreclosed and the lands in question, as well as all other property of the company, had been sold in the foreclosure proceedings and had been purchased by the defendant Olcott; and that by reason of the special acts relating to the company and the general laws of the State relating to railroads, and by the construction and completion of its lines of railway in reliance upon such laws and the grants thereby made, the company had acquired, and its vendee or assignee and co-defendant Olcott had become invested with, a contract and vested right to said lands within the protection of Section 10 of Article I of the Constitution of the United States, which denies to the States power to pass any law impairing the obligation of contracts, and Article XIV. of the amend-

ments of said Constitution, providing that no State shall deprive any person of life, liberty or property without due process of law, etc.; and that in so far as the Constitution of 1869, or any other pretended law of the State, sought to impair said contract or divest such right, the same was in contravention of the said provision of the Constitution of the United States (Record, pp. 22, 23).

The answer further averred, in effect, that the decisions of the Governor of the State, required as a prerequisite for the issuance of land certificates that the company had done all the necessary antecedent acts and performed all the conditions precedent to a right to receive said lands—were conclusive against the State, the Governor having been by the various legislative acts referred to constituted the sole and final judge whether or not such antecedent acts and conditions had been performed, and that the certificates of the General Land Office and the surveys thereunder, pursuant to the findings and decision of the Governor of the State, vested a full and perfect title to the lands in the company; and it was further set up and claimed that, by reason of the construction placed upon its charter and the

special acts relating to the company and the general laws of the State by all departments of the State Government, and by reason of the said grants of land, credit was given to the defendant company in the money markets of the world, and it was enabled to raise and procure money for the purpose of constructing and extending its railroad by mortgaging the lands now sued for, which lands form a most important element in the credit originally obtained by it in disposing of its bonds secured by deed of trust thereon; that during more than twenty years the State and her officers stood by and allowed the assertion of title by the defendant company to said lands, whereby credit was obtained, as aforesaid, and they were therefore estopped from setting up any title thereto, etc. (Record, 23). Without stating the answer in more detail, we beg to refer to it as contained in the record (pp. 6-27), if a more minute examination of it should be desired.

It is proper to observe here, that as a matter of fact, the theory upon which this suit was commenced was that, in the view of the Attorney-General who filed it, the company was not entitled to land for sidings, and that, because the certificates issued for the western branch showed

upon their face that the sidings were included, the entire grant was therefore void; and it is not too much to say that the grounds upon which the case was decided by the District Court, or by the Appellate Courts of the State, were not in the mind of the Attorney-General when this litigation was commenced, but were mere after-thoughts developed when the Supreme Court of Texas decided (June 27, 1891) in G. H. & S. A. Ry. Co. vs. State, 81 Tex., 572, while this suit was pending in the court below, that the theory of the Attorney-General prompting the institution of this suit was unsound, and that, if lands for sidings were not granted, only the certificates for sidings should be canceled. This accounts for the amount of matter appearing in the pleadings, as well as in the evidence, having special reference to the issuance of certificates for the construction of side-tracks.

Grounds of Decision in the District Court.

As authorized by the Texas practice, the District Judge stated in writing the facts found by him and his conclusions of law (Record, 28-30). We have no complaint to make of the *facts* as found by him, so far as they go, except the finding

that the company did not complete its road within the time required by the special act of September 21, 1866, and even as to that our complaint is not so much with the fact as found as with the action of the Court in inquiring into it at all, and with the conclusion of law (the 9th, Record, 33) based upon such finding, our contention being upon that point, briefly, that the fact was for the determination of the executive officers of the State exclusively, and that, they having determined it years before the trial, their determination was conclusive and the Court had no right to inquire into it; and, moreover, that the consequences of the fact, if fact it be, have not been claimed, but have been expressly waived, by the State. Our position with respect to this point is presented in the argument under the ninth (Record, 157-163) and eleventh (Record, 169-178) grounds of the petition for writ of error in the State Supreme Court.

As already pointed out, the District Judge concluded, as a matter of law (Eighth Conclusion of Law, Record, p. 33), that the Act of November 13, 1866 (*post*, p. LXI.), continuing in force for ten years from that date the laws granting lands to railroad companies, was unconstitu-

tional and void, and that therefore the general law of January 30, 1854, had expired before the adoption of the Constitution of 1869, and that there were, therefore, at that time no general laws in force granting lands to railroad companies ; but, while this case was pending in the Court of Civil Appeals, the Supreme Court of Texas, in Quinlan vs. Houston and Texas Central Railway Company, 89 Tex., 356, held that the Act of November 13, 1866, was valid. The District Judge also held in effect (Tenth Conclusion of Law, Record, p. 33) that the Constitution of 1869 repealed the land-grant laws and that the Act of August 15, 1870 (*post*, p. LXVIII.) was contrary to the Constitution of 1869 ; and that for such reasons, the road in question having been constructed after the adoption of the Constitution of 1869, the issuance and location of the certificates therefor were unauthorized and void.

Grounds of Decision in the Court of Civil Appeals.

In G., H. & S. A. Ry. vs. State of Texas, 89 Texas, 340, the Supreme Court of Texas held that the Constitution of 1869 repealed the laws

theretofore passed granting lands to railway companies; and in the case at bar the Court of Civil Appeals, after adopting that view, by reference to the opinion in that case, and in *Quinlan vs. H. & T. C. Ry. Co.*, 89 Texas, 356, practically conceded that the Houston and Texas Central Railway Company had the right to construct the line to Austin under the early laws relating to the company that were passed prior to the adoption of the Constitution of 1869, and that such right was retained by the company, but that the right to acquire sixteen sections of land per mile for such branch road was not, and for the reason apparently that such grant in the view of the Court had been taken away by the Constitution of 1869. It was also held by that Court that the Act of August 15, 1870, was contrary to the Constitution of 1869 and void.

The grounds of the decision of the Court of Civil Appeals therefore seemed to be (1) that the Constitution of 1869 repealed all laws then in force granting lands to railway companies, although under the Act of November 13, 1866, such laws were continued in force for ten years thereafter, and also regardless, it would seem, of the extent to which such land-grant laws had

been accepted and acted upon by the construction of railroads; (2) that while the company had the right, under the early acts relating to it, to construct the line to Austin, it did not retain, after the adoption of the Constitution of 1869, the land grant, if any, for that line; (3) and that the Act of August 15, 1870, could not affect the claim to the land grant in any way because it was contrary to that provision of the Constitution of 1869 which the Court held prohibited land grants. Thus it clearly appears that the judgment of the Court of Civil Appeals was to the effect that the Constitution of 1869 repealed all laws granting lands to railroad companies apparently without regard to the contract right arising from the acceptance of such laws and the construction of the lines of railroad thereunder.

Grounds of the Decision of the State Supreme Court.

The State Supreme Court, in its opinion (Record, 185-187), denying the petition for writ of error, declined to consider whether the company had the right, under the early acts relating to it, to construct its line to Austin, but held that the extension of the former Washington County Railroad (which connected with the company's

main line at Hempstead) from Brenham to Austin was unauthorized by any of the acts relating to the company except that of August 15th, 1870, and that, the latter act having been passed while the Constitution of 1869 was in force, the company could not, by anything done thereunder, acquire any right to the land grant; and upon this ground it refused the writ of error without considering other questions determined by the District Court.

The effect of this ruling was that the company did not have any contract right to the lands granted it for the construction of the Austin line under any law passed prior to the Constitution of 1869, and that therefore there was no contract to be impaired by that Constitution.

On writ of error from this Court to the Court of Civil Appeals, the Federal questions supporting the jurisdiction of this Court should, we assume, be looked for in the rulings of that Court, and Federal questions there determined are not to be limited or eliminated by an opinion filed by the State Supreme Court in refusing an application for a writ of error. If the Federal question is to be looked for in the judgment directly under review (that is, the judgment of the Court

of Civil Appeals) rather than in an opinion of the Supreme Court of the State refusing to take jurisdiction of the case, then it is entirely clear that the Federal questions exist. If, however, we are to look to the opinion of the State Supreme Court, then the first inquiry is whether there was in existence a contract to be impaired by the Constitution of 1869, as alleged by the plaintiffs in error and as denied by the State Supreme Court.

The Federal Questions in the Record.

We have already shown (*ante*, pp. 31-36) that the Federal questions pointed out in the assignments of error (Record, 191-193) were specially set up and claimed in the answer of the railway company and Olcott in the District Court; that they were preserved in the assignment of errors filed on the appeal to the Court of Civil Appeals (Record, 87-93); that they were involved in the decision and were expressly decided by the latter Court (Record, 95-97), and were preserved and presented again in the motions for rehearing in that Court (Record, 98, 102, 108, 116, 136); that they were presented to the Supreme Court in the petition for writ of error (Record, 140, 142, 164-169), and that they

were, in effect, decided by the latter Court against plaintiffs in error in its ruling that the contract right asserted did not exist. They are presented in this Court by the following assignment of errors (Record, 191-193) :

“ FIRST.

“ The said Court of Civil Appeals erred “ in overruling and in holding not well “ taken appellant’s first and sixth assign- “ ments of error, which complained of the “ action and ruling of the Court below in “ overruling and denying the petitioner’s “ plea to the jurisdiction of said Court, based “ upon the ground, in effect, that all the “ land sued for was at the time in the cus- “ tody and possession of the Circuit Court “ of the United States in and for the East- “ ern District of Texas, at Galveston, in “ Consolidated Cause No. 198, on the equity “ docket of said Court, entitled ‘ Nelson S. “ ‘ Easton and James Rintoul, Trustees, and “ ‘ The Farmers Loan & Trust Company, “ ‘ Trustee, vs. The Houston and Texas Cen- “ ‘ tral Railway Company *et al.*,’ through “ Charles Dillingham, the Receiver of said “ Circuit Court in said cause, and this suit “ was instituted without permission of said “ Court and in deciding that notwithstanding “ such facts the District Court of Nolan “ County had jurisdiction of this cause.

“ SECOND.

“ The said Court of Civil Appeals erred
 “ in overruling and holding not well taken
 “ appellants' second assignment of error,
 “ complaining, in effect, of the action and
 “ ruling of the Court below in overruling
 “ and denying and holding not well taken
 “ petitioners' plea in abatement, based upon
 “ the ground, in effect, that Charles Dilling-
 “ ham, the Receiver of the Circuit Court
 “ of the United States in and for the East-
 “ ern District of Texas in the cause above
 “ mentioned, was a necessary and proper
 “ party to this suit, because all the property
 “ sued for was in his custody and possession
 “ as such Receiver.

“ THIRD.

“ The said Court of Civil Appeals erred
 “ in overruling and holding not well taken
 “ appellants' seventh, fourteenth, seven-
 “ teenth and twenty-first assignments of
 “ error, and in deciding that the acts of the
 “ Legislature of the State of Texas, ap-
 “ proved March 11th, 1848; February 14th,
 “ 1852; February 7th, 1853; January 30th,
 “ 1854; January 23d, 1856; September
 “ 1st, 1856; February 8th, 1862; Jan-
 “ uary 11th, 1862; September 21st, 1866;
 “ November 13th, 1866; August 15th,
 “ 1870, and the declaration of the con-
 “ stitutional convention of the State of Texas

" passed August 29th, 1868, and the acceptance of said laws, and the construction by plaintiff in error, at large expense, of an important part of its lines of railway prior to the adoption of the constitution of 1869, and the completion of its entire line subsequently in due time did not constitute a valid contract between the State of Texas and said railway company, entitling said railway company to and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in holding, in effect, that said contract could be and was impaired and the right of plaintiffs in error to said land was divested by the Constitution of the State of Texas adopted in 1869, contrary to and in violation of the Constitution of the United States, and especially Article 1, Section 10, thereof, and Section 1 of Article 14 of the amendments thereof.

" FOURTH.

" The said Court of Civil Appeals erred in not deciding that the acts of the Legislature of the State of Texas, approved March 11th, 1848; February 14th, 1852; February 7th, 1853; January 30th, 1854; January 23d, 1856; September 1st, 1856; February 8th, 1862; January 11th, 1862; September 21st, 1866; November 13th, 1866; August 15th, 1870, and the declara-

"tion of the Constitutional Convention of
 "the State of Texas, passed August 29th,
 "1868, and the acceptance of said laws, and
 "the construction by plaintiff in error rail-
 "way company, at large expense, of an
 "important part of its lines of railway prior
 "to the adoption of the Constitution of 1869,
 "and the completion of its entire line sub-
 "sequently in due time, constituted a valid
 "contract between the State of Texas and
 "said railway company, entitling said rail-
 "way company to and creating in it a vested
 "right to the lands granted by said laws and
 "earned by said railway company there-
 "under, including the lands involved in this
 "suit, and in not holding that said contract
 "could not be and was not impaired and the
 "right of plaintiffs in error was not divested
 "by the Constitution of the State of Texas
 "adopted in 1869, and that, in so far as the
 "State Constitution attempted to impair
 "such contract and divest such right, the
 "same was and is contrary to and in viola-
 "tion of the Constitution of the United
 "States, and especially Article 1 of Section
 "10 thereof, and Section 1 of Article XIV.
 "of the amendments thereof, and therefore
 "void.

"FIFTH.

"The said Court of Civil Appeals erred
 "in affirming the judgment of the District
 "Court of Nolan County whereby the State
 "of Texas had and recovered the said land

"from plaintiffs in error, and in not reversing the said judgment."

The questions presented by the first and second assignments of error do not seem to involve in any way the merits of the controversy between the parties; and the receivership referred to having terminated since the trial of the cause in the District Court they have ceased to be of practical importance and therefore we shall not argue them.

Since the Supreme Court of Texas, in their opinion refusing the writ of error, give different reasons from those given by the Court of Civil Appeals for affirming the judgment, and since, in the view of the State Supreme Court, there was no contract between the company and the State to be impaired by the Constitution of 1869, it is proper to consider whether the Federal questions involved in the decision of the Court of Civil Appeals are affected by the opinion of the Supreme Court in refusing the writ of error, and whether such opinion affects the right of this Court to determine for itself whether there was a contract impaired by the action of the State; and these considerations may be disposed of before proceeding with the discussion of the main question.

BRIEF OF ARGUMENT.

I.

The judgment of the Court of Civil Appeals—the Court having the record and to which the writ of error went—is the judgment under review, and not the opinion of the State Supreme Court given upon its refusal to grant a writ of error.

Under the appellate judiciary system of Texas all appeals from courts of record must be taken in the first instance to the Court of Civil Appeals, as provided by Article 996, Revised Statutes 1895, which reads as follows:

“The appellate jurisdiction of the Courts
“of Civil Appeals shall extend to civil cases
“within the limits of their respective dis-
“tricts (1) of which the district courts have
“original or appellate jurisdiction; (2) of
“which the County Court has original
“jurisdiction; (3) of which the County
“Court has appellate jurisdiction when
“the judgment or amount in controversy,
“or the judgment rendered, shall exceed
“\$100, exclusive of interest and costs. The
“judgment of the Courts of Civil Appeals
“shall be conclusive in all cases on the facts

" of the case, and a judgment of such courts
 " shall be conclusive on the law and fact,
 " nor shall a writ of error be allowed thereto
 " from the Supreme Court in the following
 " cases, to wit: (1) In civil cases appealed
 " from a County Court or from a District
 " Court when, under the Constitution, the
 " County Court would have had original or
 " appellate jurisdiction to try it, except in
 " probate matters and in cases involving
 " the revenue laws of the State or the va-
 " lidity of a statute; (2) all cases of bound-
 " ary; (3) all cases of slander and divorce;
 " (4) all cases of contested elections of every
 " character other than for State officers, ex-
 " cept where the validity of the statute is
 " attacked by the decision."

Appellate jurisdiction of the Supreme Court of the State is defined by Article 940 of the same statute in accordance with the Constitution, as follows :

" The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate but not final jurisdiction."

And the first clause of Article 941 of the same statute provides that " all causes shall be car-

"ried up to the Supreme Court by writs of error "upon final judgment," etc., and not on judgments reversing and remanding causes except in a specified class of cases unnecessary to notice here. The practice with respect to applications to the Supreme Court for writs of error to the Courts of Civil Appeals is governed by Article 942 of the statute, which reads as follows:

" Any party desiring to sue out a writ of
" error before the Supreme Court shall pre-
" sent his petition addressed to said Court,
" stating the nature of his case and the
" grounds upon which the writ of error is
" prayed for, and showing that the Supreme
" Court has jurisdiction thereof; and the
" petition shall contain such other requisites
" as may be prescribed by the Supreme
" Court. The petition shall be filed with
" the Clerk of the Court of Civil Appeals
" within thirty days from the overruling of
" the motion for rehearing, and thereupon
" the said Clerk of the Court of Civil Ap-
" peals shall note upon his record the filing
" of said application, and shall forward to
" the Clerk of the Supreme Court the said
" application, together with the original
" record in the case, and the opinions of the
" Court of Civil Appeals and the motion
" filed therein, and certified copies of the
" judgments and orders of the Court of Civil

" Appeals ; provided, that the party applying for the writ of error shall deposit with the Clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the said record to and from the Clerk of the Supreme Court, which sum shall be charged as costs in the suit. If the writ of error be granted and the plaintiff in error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial Court to be approved by the Clerk of said Court, and a certified copy thereof shall at once be transmitted to the Supreme Court, and upon the filing of said certified copy the Clerk of the Supreme Court shall issue the citation in error as may be prescribed by the rules of the Supreme Court."

and is further regulated by Rule 1 adopted by the Supreme Court for its government (87 Tex., p. XXXVII.).

The succeeding article of the statute (943) is the only other statutory provision governing the Supreme Court with respect to applications for writs of error to the Courts of Civil Appeals, and which reads as follows :

" If it shall appear to the Supreme Court

" from an inspection of the petition and
" record that there is error in said judgment
" of the Courts of Civil Appeals, it shall
" grant a writ of error, returnable in thirty
" days, in such manner as may be pre-
" scribed by said Court."

Hence, upon the refusal by the Supreme Court of an application for writ of error, the judgment of the Court of Civil Appeals becomes final. By refusing the writ of error it declines to review the judgment of the Court of Civil Appeals, and the judgment of the latter Court thereupon becomes the judgment of the highest Court of the State in which a decision in the suit could be had, and is, therefore, the judgment to be reviewed by this Court where its writ of error will lie, as was recognized in *Bacon vs. Texas*, 163 U. S., 207, where it was said (p. 215):

" The first question which arises in this
" case is in regard to our jurisdiction to review
" the judgment of the Court of Civil Ap-
" peals of the State of Texas. Some question
" was made in regard to the regularity and
" sufficiency of the writ of error from this
" Court to the Court of Civil Appeals, as that
" Court is not the highest Court in the State.
" We think, however, the criticism is not well
" founded. So far as this case is concerned,

" that Court is the highest Court of the State
" in which a decision in this suit could be
" had. An application was made to the Su-
" preme Court of the State of Texas for a
" writ of error to the Court of Civil Appeals
" for the Second District by the defendants in
" the court below, after judgment in the latter
" court, for the purpose of reviewing the judg-
" ment of that Court, but the Supreme Court
" denied the application, *and thus prevented by*
" *its action a review by it of the judgment of*
" *the Court of Civil Appeals.* The judgment
" of that Court has, therefore, become the
" judgment of the highest Court of the State
" in which a decision in the suit could be had,
" and this Court may, so far as this point is
" concerned, re-examine the same on writ of
" error, under the provisions of Section 709,
" Revised Statutes of the United States."

We submit that the judgment of the Court of Civil Appeals is the only judgment for review by this Court, and that since the Supreme Court refused the application for a writ of error its opinion is to be left out of view entirely, and, indeed, is not properly a part of the record in this Court. There is no statute of the State or rule of the State courts that makes it any part of the record in the Court of Civil Appeals. By Article 944 of the Revised Statutes it is provided that:

“ The Supreme Court shall, from time to
 “ to time, make and promulgate suitable
 “ forms, rules and regulations for carrying
 “ into effect the foregoing articles relating to
 “ the jurisdiction and practice of the Su-
 “ preme Court ; ”

and by Article 947 it is further provided that ;

“ The Supreme Court shall have power to
 “ make, establish and enforce all necessary
 “ rules of practice and procedure not incon-
 “ sistent with the laws of this State for the
 “ government of said Court and all other
 “ courts of the State, so as to expedite the
 “ dispatch of business in said courts.”

While, as we have seen, the statute (Articles 942 and 943) provides for the issuance of the writ of error where the Supreme Court, upon inspection of the application therefor, finds error in the judgment of the Court of Civil Appeals, it makes no provision for notifying the Court of Civil Appeals of the Supreme Court's action in refusing the application, but leaves that matter to be governed by rules to be established by the Supreme Court in the exercise of the power conferred by Articles 944 and 947 above quoted. In pursuance thereof, the Supreme Court established a rule as follows (Rule 4 for the Supreme Court, 87 Texas, p. XXXVIII.) :

" Upon a refusal by this Court of an application for a writ of error, the Clerk of this Court shall transmit, with the least practicable delay, to the Clerk of the Court of Civil Appeals to which the writ of error was sought to be sued out, a certified copy of the order of this Court denying such application; and shall return all the file papers of that Court to the Clerk thereof, but shall not return the petition for writ of error."

It is to be observed that no provision is made for sending down any opinion that the Supreme Court may file, and only the order refusing the application is to be certified, while the petition itself, the rule expressly requires, shall remain in the Supreme Court. It appears from the record in this cause (pp. 187, 188) that the order of the Supreme Court refusing the application for writ of error was certified by the Clerk of that Court on the first day of May, 1897, and filed in the Court of Civil Appeals on the 13th day of that month. It appears, however, that certified copies of the opinion of the Supreme Court (Record, 185-187), delivered when the application was received, was prepared and certified by the Clerk of that Court on June 5th, 1897, and was filed in the Court of Civil Appeals on the 11th day of the

same month—nearly a month after the order refusing the writ of error was filed, and the petition to the Supreme Court for writ of error, as it appears in the record (pp. 140 to 184), is a copy of the petition as filed in the Court of Civil Appeals August 10th, 1896 (Record, 184), as required by Article 942, Revised Statutes, above quoted, and which was then transmitted to the Supreme Court and filed there August 7th, 1896; and that this copy is found in the record, and is the one certified by the Clerk of the Supreme Court May 6th, 1897 (Record, 187), and filed in the Court of Civil Appeals May 24th, 1897, about ten days after the order refusing the writ of error was filed in the Court of Civil Appeals (Record, 187, 188).

From the provisions of the statute and the rules governing the subject it is evident that the opinion of the Supreme Court and the petition for writ of error are not properly parts of the record to be considered by this Court. The record proper consists of the record in the Court of Civil Appeals, which would include, of course, the order of the Supreme Court refusing the writ of error. Since, under the laws of the State, parties invoking the jurisdiction of this Court in

a case of this character, may apply to the State Supreme Court for a writ of error, though not entitled to the writ as a matter of right, it may be necessary that the record in this Court should show that the State Supreme Court refused to take jurisdiction of the case "and thus prevented, " by its action, a review by it of the judgment of "the Court of Civil Appeals," and that thereby the judgment of the latter court had "become the "judgment of the highest Court of the State in which a decision in the suit could be had." When this is shown, as in this case (Record, 187-188) by the order of the Supreme Court, the record in this Court is complete, and it will be presumed, if the question is made, that an application was duly made to the State Supreme Court presenting all the grounds of error here complained of in the judgment of the Court of Civil Appeals.

II.

When this Court is called upon to determine whether an alleged contract has been impaired by a State law it will inquire whether such contract exists, and will determine that question for itself independently of the judgment of the State Court.

Since the State Supreme Court, in its opinion, held that the company had no contract for the land grant in aid of the Austin line, it is perhaps proper that we should discuss the right of this Court to determine that question for itself without regard to the opinion of the State Court, although we contend under the preceding point that the opinion of the State Supreme Court is not properly a part of the record in this cause and is to be left out of view in considering the questions involved. But little need be said, however, in support of the proposition now submitted. It is too well settled by repeated decisions of this Court that in the inquiry whether State legislation impairs the obligation of contracts, and thereby violates the Federal Constitution, this Court must decide for itself whether any valid

contract existed, and in making up its judgment on that question it is not controlled by the decisions of the State Court (*State Bank of Ohio vs. Knoop*, 16 How., 369, 391; *Ohio Life Ins. Co. vs. DeBolt*, 16 How., 416, 432; *Jefferson Branch Bank vs. Skelley*, 1 Black, 436; *Bridge Proprietors vs. Hoboken Co.*, 1 Wall., 145; *Delmas vs. Ins. Co.*, 14 Wall., 661; *University vs. People*, 99 U. S., 323; *Louisville Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 683; *Hoadley vs. San Francisco*, 124 U. S., 639). "The existence of the " contract or right is part of the Federal question " itself" (124 U. S., 645).

In *Jefferson Branch Bank vs. Skelley* this Court said (1 Black, 443):

" It has never been denied, nor is it
 " now, that the Supreme Court of the
 " United States has an appellate power
 " to revise the judgment of the Supreme
 " Court of a State whenever such a Court
 " shall adjudge that not to be a contract
 " which has been alleged, in the forms of
 " legal proceedings, by a litigant, to be
 " one within the meaning of that clause of
 " the Constitution of the United States
 " which inhibits the State from passing any
 " law impairing the obligation of contracts.
 " Of what use would the appellate power be

" to the litigant who feels himself aggrieved
 " by some particular State legislation if
 " this Court could not decide, independently
 " of all adjudication by the Supreme Court
 " of a State, whether or not the phrasology
 " of the instrument in controversy was ex-
 " pressive of a contract and within the pro-
 " tection of the Constitution of the United
 " States, and that its obligation should be
 " enforced, notwithstanding a contrary con-
 " clusion by the Supreme Court of a State?
 " It never was intended, and cannot be sus-
 " tained by any course of reasoning, that
 " this Court should, or could with fidelity
 " to the Constitution of the United States,
 " follow the construction of the Supreme
 " Court of a State in such matter, when it
 " entertained a different opinion; and, in
 " forming its judgment in such a case, it
 " makes no difference in the obligation of
 " this Court, in reversing the judgment of
 " the Supreme Court of a State upon such a
 " contract, whether it be one claimed to be
 " such under the form of State legislation,
 " or has been made by a covenant or agree-
 " ment by the agents of a State by its
 " authority."

And in *Delmas vs. Insurance Co.* it was again
 said (14 Wall., 668):

" Besides, this Court has always jealously
 " asserted the right, when the question be-
 " fore it was the impairing of the obliga-

"tion of a contract by State legislation, to
"ascertain for itself whether there was a
"contract to be impaired. If it were not so,
"the constitutional provision could always
"be evaded by the State courts giving such
"construction to the contract or such de-
"cisions concerning its validity as to render
"the power of this Court of no avail in
"upholding it against unconstitutional State
"legislation."

III.

By the acceptance of the various acts of the Legislature of Texas incorporating and relating to it and relating to the land grant, thereby and by the general laws of the State made to it in consideration of the construction of its road, and by entering upon and in due time completing an important part of its line before the adoption of the Constitution of 1869, and by restoring to its former stockholders, as required by the Acts of January 11th, 1862, their rights which had been foreclosed, the railway company acquired, under such laws as well as under the ordinances and declarations of the constitutional convention of 1868, a contract and vested right to the lands in question, which contract and right could not be impaired or divested by the Constitution of 1869, or by any other pretended law or act of said State, contrary to the Constitution of the United States, especially Article 1, Section 10, thereof, which denies to the States power to pass any law impairing the obligation of contracts, and Section 1 of

**Article XIV. of the amendments thereof,
prohibiting any State from depriving any
person of property without due course of
law.**

By the Act of March 11th, 1848, incorporating the company, the Houston and Texas Central Railway Company was not only authorized to construct the main line of the railroad therein specified, but was expressly invested "*with the privilege of making, owning and maintaining such branches,*" as it should deem expedient. That this privilege authorized the construction of the line to Austin of course admits of no question. By Section 14 of the special Act of February 14th, 1852 (*post*, p. XIV.), there was granted to the company eight sections of land for every mile of railroad it should complete. This grant was without restriction or limitation with respect to the lines thus aided, and therefore extended to branches as well as main lines.

By the special Act of February 7th, 1853 (*post*, pp. XVIII.-XIX.), the company was expressly authorized and empowered "*to make and construct simultaneously with the main railway described in the original acts establishing said*

" company a branch thereof towards the City of
" Austin," etc.

By the general Act of January 30th, 1854 (*post*, p. XIX.), there was, as we have seen, granted to all railroad companies theretofore chartered, and which should construct a section of twenty-five miles or more of railroad, sixteen sections of land for "every mile of road so constructed and put in running order. This act, however, provided in Section 12 (*post*, p. XXVIII.) that any company then entitled, as this company was, to a grant of eight sections of land per mile, and which should accept the provisions of the act, should not be entitled to receive the grant thereby made for any branch road. Hence, this company, having already a grant of eight sections per mile, could not claim, by virtue of the general Act of January 30th, 1854, alone and unaided by subsequent legislation, the grant made by that act generally for anything except its main line. But this situation was changed by the special act of January 23d, 1856, entitled "An Act for the relief of the Galveston and Red River Railway Company and supplementary to "the several acts incorporating said company." Up to the time of the passage of this act the

company had the general branching privileges conferred, as we have seen, by its original act of incorporation, including the right to construct a branch line to the City of Austin expressly conferred by the special Act of February 7th, 1853, but by reason of the limitations contained in Section 12 of the general Act of January 30th, 1854, already referred to, the grant of sixteen sections per mile by that act did not extend to branch lines. In order, therefore, that the company should receive the grant of sixteen sections per mile for the Austin line, it became necessary to modify the limitations contained in the Act of 1854 with respect to branch lines, or confer the grant by further legislation. Therefore, the special Act of January 23d, 1856, was enacted, by which the rights, benefits and privileges of the general Act of January 30th, 1854, were expressly extended to the company without any limitation with respect to branch lines but upon these conditions: (1) That the company should maintain its principal office and keep its records on its line of road; (2) that a majority of its directors should reside in the State, and that its meetings for election of directors and officers should be held in the State; (3) that it should

complete its main line to a certain point before commencing the branch road; (4) that it should submit itself to the general Act of February 7, 1853, regulating railroads; and (5) the very important condition imposed by Section 5 of the act that the company should "yield all general "branching privileges, except such as are expressly granted by the provisions of its "charter, to certain points, and shall be required "to spend only so much of its capital stock "upon any branch as shall be expressly subscribed to such branch, and shall not spend "upon its trunk any moneys subscribed to any "branch" (*post*, p. XXXIV.). The branching privileges then enjoyed by the company were general, and Austin was the only "certain "point" specified in the charter of the company with reference to the construction of branches. The only provisions in reference to branches contained in the acts theretofore passed are those found in Section 2 of the original act of incorporation (*post*, p. I.) conferring the general branching privileges and the authority expressly conferred in Section 2 of the special Act of February 7th, 1853, (*post*, p. XIX.), to construct a branch to the City of Austin. It

seems evident, therefore, that the Austin branch was the one contemplated by Section 5 of the Act of January 23d, 1856, and that the right to construct this branch was thereby distinctly preserved, and that the grant of sixteen sections per mile, made by the general Act of January 30th, 1854, was extended by the special act of January 23, 1856, to the Austin branch. There could be no other object in expressly applying the benefits of the Act of January 30, 1854, to the company. It was already entitled, as we have seen, to the benefits of that act for the construction of its main line. It would have been idle and useless, therefore, for the Legislature to have extended the benefits of that act to the company, as was done by the special act referred to, unless it was for the purpose of extending to the Austin line the authority to construct, which was expressly reserved by the special act. Effect must be given to the provision, and the only effect that can be given was the extension of the right to lands for the construction of the Austin line. If it had not that effect, then it had no effect, and the Legislature meant nothing by it. Section 5, as we have seen, required the company

to yield all branching privileges except for the line to Austin, and this evinces the purpose of the Legislature not to grant lands for branches generally, but only for the main line and the line to Austin. But for Section 5 the company might have constructed, under Section 2 of its original act of incorporation, branches to various points, and, under the Act of 1856, could have claimed the land grant therefor; and it was to guard against this that Section 5 was evidently incorporated in the act. There could have been no other reason for the incorporation of Section 5. The policy of the State at that time was not averse to the construction of railroads, as is well known, and as is evidenced by the legislation of the period; and the construction of a multitude of branches by this company, if it could have been accomplished without State aid, would have been welcomed by the State and the people. But the State was not willing to grant lands for construction without limit and without knowing the particular lines to be constructed, and for which the land grant might be claimed. Hence, by Section 5, the State required the company to yield all branching privileges except for the Austin line, thereby confining the grant to the

main line and to the branch line to Austin and placing a limit upon the grant which the company might otherwise claim. That the express extension of the general Act of January 30, 1854, by the special Act of January 23, 1856, was intended to aid and encourage the construction of the line to Austin, and that such construction was contemplated thereby, is further evidenced by the provisions of Section 5, requiring the company to spend on the branch only the money subscribed for such branch, and on the trunk only the money subscribed therefor.

In construing the general Act of January 30, 1854, and a subsequent special act extending the benefits thereof to a company subsequently incorporated, the Supreme Court of Texas, in the recent case of *Quinlan vs. H. & T. C. Ry. Co.*, 89 Texas, 356, in speaking of the legislative policy of that period, said (p. 369):

"The legislation of that era, for the encouragement of the construction of railroads, makes it manifest, we think, that the legislative policy was, as to companies then chartered, to confer by general laws the privilege of earning lands, and in granting new charters to make such provisions for the companies thereby created

" as should be demanded by such special
" conditions as should exist at the time of
" the grant. That such was the policy of the
" Legislature which passed the statute in
" question is shown by the subsequent leg-
" islation at the same session. There were
" seven special charters granted in 1854, in
" all of which special provisions were made
" for land grants. The same policy and
" practice were pursued by subsequent Leg-
" islatures while the Act of 1854 continued
" in force."

It was not the purpose of the Legislature, in passing the general Act of 1854, to extend the grant thereby made to encourage the construction of branch roads. But in 1856 the Legislature of that year conceived that "special conditions" did exist at that time which demanded that the grant of sixteen sections per mile should be made, and therefore passed the special Act of January 23d of that year, removing the restrictions contained in Section 12 of the Act of January 30th, 1854, with respect to branch lines, so far as this company was concerned, and expressly extending the land grant to the company for its Austin branch as well as its main line.

But, if there should be any doubt respecting the right of the company to lands for the con-

struction of its western division to Austin before, it was removed by the special act approved September 21st, 1866, entitled "An Act granting " lands to the Houston and Texas Central Rail- " way Company" (*post*, p. LVII.). By this act a specific grant was made to said company of "sixteen sections of land of 640 acres each " for every mile of road it has constructed or " may construct and put in running order " in accordance with the provisions of the " charter of said company." It has not been, as far as we are aware, denied by the State or any of its officers, and we can conceive of no grounds upon which it could be denied, that this act granted lands for the construction of the Austin line as well as the main line of the company. The only thing urged against this act is that the company failed to construct its line as expeditiously as the act required; and the District Court inquired into the facts as to the time of construction, and held that the company lost the right to the land granted by the act through its failure, as found by that Court, to construct its line within the time therein specified (Ninth Conclusion of Law, Record, 33). There are several effectual answers to this contention:

The first is that the inquiry was not open to the Court, because the fact of construction was ascertained and determined by the executive officers of the State charged with the administration of the laws granting lands to railroads and invested with the exclusive jurisdiction to determine the fact. By Section 2 of the Act (*post*, p. LIX.), as well as by the other laws granting lands to railroad companies, it was made the duty of the Governor, upon completion from time to time of sections of twenty-five miles or more of the road, to appoint an engineer to examine it, and that, upon the report of the engineer showing that the road had been constructed in accordance with the provisions of the charter of the company and the general laws of the State, it should be the duty of the Commissioner of the General Land Office to issue to the company certificates to the lands granted, and that thereupon the company should have the right to have any unappropriated public lands surveyed, and to locate the certificates thereon. In the exercise of the power thus conferred the Governor, in obedience to the act, appointed an engineer (Record, 56, 57), who inspected the road and who reported that it had been completed in

accordance with the law (Record, 57-63). Upon this report the certificates were issued by the Commissioner of the General Land Office under which the lands in question were surveyed and the locations made, as shown by the admissions of the State (Record, 48), and as found by the District Court (Record, 17), and that the company has ever since paid the taxes assessed by the State thereon. In short, it is not disputed that the executive department, whose duty it was under the law, and who were invested by law with exclusive and final jurisdiction in that behalf, ascertained and determined the fact of construction and compliance with the provisions of the law, and in the exercise of their lawful authority thereupon issued the certificates in question. We submit that this is an end of the matter. The question of the time of construction was purely one of fact. It is not evidenced by any legislative enactment declaring the fact and assuming to enforce a forfeiture, nor by any judicial decree in a proceeding for that purpose. The legislative, the judicial and the registration records of the State, beyond which certainly the citizen ought not to be required to go, are absolutely silent. It is a fact, resting wholly within

the memory of man, and by the great lapse of time it must have been, when the cause was tried in the Court below, well-nigh, if not entirely, lost. The road had been constructed and in full operation for many years. The facts upon which the Executive Department acted were not required by law to be preserved. Their jurisdiction was exclusive and the finding made final by law; and what the evidence before them was as to the time of construction is not known.

That the findings of fact by the Executive Department with respect to matters such as these, entrusted to that Department, are conclusive and not open to review by the Courts, has been settled by repeated decisions of this Court, as well as by the Supreme Court of Texas.

United States vs. Arredondo, 6 Peters, 691; *United States vs. Burlington, etc., R. Co.*, 98 U. S., 334, 341; *Kansas Pacific R. Co. vs. Atchison, etc., R. Co.*, 112 U. S., 414, 418; *Maxwell Land Grant Case*, 121 U. S., 325, 381; *Colorado Coal Co. vs. United States*, 123 U. S., 307, 316; *United States vs. Budd*, 144 U. S., 154, 161; *United States vs. Alabama R. Co.*, 142 U. S., 615, 621; *United States vs. California, etc., Land Co.*, 148 U. S., 31, 43; *United States vs. Union Pacific R.*

Co., 148 U. S., 562; *United States vs. Denver, etc., R. Co.*, 150 U. S., 1; *Chandler vs. Calumet Mining Co.*, 149 U. S., 79; *United States vs. Dalles, etc., Co.*, 7 U. S. App., 297; *Heirs of Holloman vs. Peebles*, 1 Tex., 673, 699; *Hancock vs. McKinney*, 7 Texas, 384, 440; *Jenkins vs. Chambers*, 9 Tex., 167, 230; *Styles vs. Gray*, 10 Tex., 503, 506; *Ruis vs. Chambers*, 15 Tex., 586, 590.

Without pursuing this point further we beg to refer to our argument in support of the petition to the Supreme Court of Texas for writ of error contained in the record, pages 170 to 178.

Another answer to the claim that the road was not constructed within the time required by the act is that the forfeiture for failure to construct, if there was such failure, had not been declared by any judicial proceeding for that purpose, or by any legislative action equivalent to a judgment of office found at common law, and it is entirely clear that one of these are necessary — a proposition also settled by repeated decisions of this Court (*S. L., etc., R. Co. vs. McGee*, 115 U. S., 469, 473, 474; *Van Wyck vs. Knevals*, 106 U. S., 360; *Bybee vs. Oregon, etc., R. Co.*, 139 U. S., 663, 675), as well as by the Supreme

Court of Texas (*G. H. & S. A. Ry. Co. vs. State, 81 Tex., 572.*)

See, also, the argument upon this point in support of the petition to the Supreme Court of Texas for writ of error as contained in the record, pages 158-163.

Another and still more conclusive answer to the contention is that the ground of forfeiture, if any existed, was waived, and the default of the company with respect to construction was expressly excused by the State—first, by the ordinance passed December 23, 1868, by the constitutional convention (*post*, p. LXVII.), which declared “that the Houston and Texas Central Rail-
“ way Company shall not suffer any forfeiture of
“ any right secured to it by existing laws by reason
“ of the failure of said company to construct and
“ put in running order their said railway to the
“ Town of Calvert, in Robertson County, by the
“ first day of January, A. D. 1869, as required by
“ the Act of the 21st of September, A. D. 1866, pro-
“ vided said railway shall be constructed and put
“ in good running order for the use of the public,
“ to said Town of Calvert, by the first day of
“ April, A. D. 1869;” and, second, by the special

Act of August 15, 1870, which provided in Section 4 (*post*, p. LXXIII.) as follows:

“ No forfeiture of any of the rights or
“ privileges secured to it by existing laws
“ shall be enforced against the Houston and
“ Texas Central Railway Company by rea-
“ son of its failure to comply with the con-
“ ditions as to construction imposed by the
“ first section of the Act of the 21st of Sep-
“ tember, A. D. 1866, entitled ‘An Act
“ ‘granting lands to the Houston and Texas
“ ‘Central Railway Company;’ but the said
“ company shall have and enjoy all the
“ rights and privileges secured to it by
“ existing laws the same as if the conditions
“ embraced in the first section of the said
“ Act of the 21st of September, A. D. 1866,
“ had been in all respects complied with,
“ provided that the land grant to said com-
“ pany shall cease unless said company shall
“ complete their main trunk east of the
“ Brazos River to Richland Creek in Navarro
“ County within twelve months from the
“ first day of October, A. D. 1870, and shall
“ also complete their road to the City of
“ Austin within two years after the passage
“ of this act.”

The requirement of this act respecting the time of construction was fully complied with by the company (see Tenth and Thirteenth Findings of fact, Record, 30, 31).

In view of this it is not very surprising that the Court of Civil Appeals did not sustain the conclusion of the District Court that the company had lost its right to the lands granted by the Act of September 21st, 1866, by the alleged failure to complete its road within the time required by that act ; but, as we have seen, based its judgment upon an entirely different ground ; and, therefore, perhaps we should ask pardon of the Court for saying so much as we have said in reference to the alleged failure of the company to comply with the requirements of the act respecting the construction of its line within a specified time.

So it clearly appears that the company was granted by the State, prior to the adoption of the Constitution of 1869, sixteen sections of land per mile for the construction of the Austin line—first, by the Special Act of January 23, 1856, confirmed and put beyond question by the Act of September 21, 1866. The rights of the company, under its acts of incorporation, to the lands granted it by the State, were preserved throughout by extensions of time, as occasion required, in which to comply with the conditions respecting the rate of construction. By the Act of September 1, 1856,

the failure of the company to complete the second section of its road within one year after the completion of the first section was waived, and again by the Act of February 4, 1858, the company was granted further time within which to comply with the requirements of the law in reference to construction; and, again, by the Act of February 8, 1861, it was given until January 30, 1863, to perform the work required of it; but before this time expired the war commenced, and during that period the General Laws of January 11, 1862, were passed, extending the time upon the conditions therein specified until two years after the close of the war. This condition was, as we have seen (*ante*, p. 19-20), that the extension thus granted to all companies should inure to the benefit of this company only in the event that it should restore the rights of the stockholders which had been foreclosed as stockholders of the company. The company complied with this condition (Record, p. 29-32, 80), and it was alleged in the answer (Record, 18) that the holders of 7,736 shares of the stock availed themselves of the advantages given by this condition. Following this, further time was given by the Special Act of September 21, 1866, and again by

the General Act of November 13, 1866 (*post*, p. LXI.); and then again by the ordinance of December 23, 1868, passed by the constitutional convention of the State, and already referred to, and all default in reference to construction was finally waived in Section 4 of the Special Act of August 15, 1870 (*post*, p. LXXIII.).

Prior to the adoption of the Constitution of 1869 the company acquired the Washington County Railroad, and the convention which framed that Constitution on August 29th, 1868 (*post*, p. LXIII.), ratified and confirmed the purchase of that road, and declared "that the " Washington County Railroad is hereby made " and declared to be a branch of the Houston and " Texas Central Railroad, and shall henceforth be " known and called the 'Western Branch of the " 'Houston and Texas Central Railway Company,' " and shall be controlled and managed by the said " Houston and Texas Central Railway Com- " pany;" and then provided that the company should " have the right to extend the said west- " ern branch of their road from the Town of " Brenham, in Washington County, to the City " of Austin, in Travis County, by the most " eligible route as near an air line as may be

"practicable." And by Section 4 the ordinance further "provided that all laws and parts of laws concerning said Houston and Texas Central Railroad or said Washington County Railroad, "not in conflict with the foregoing provisions, "shall be considered as still in force."

When, therefore, the Constitution of 1869 was adopted, the company, at a necessarily great expense, had completed and had in operation five sections of twenty-five miles each of its main line (Record, p. 30), and, by the acquisition of the Washington County Railroad, had in operation that part of the Austin branch extending from a junction with the main line at Hempstead to the Town of Brenham directly towards Austin.

From all this it is evident that the company had been unmistakably granted by more than one act of the Legislature sixteen sections of land per mile for the construction of its Austin branch as well as its main line, and that it had accepted such grant and earned the same by the construction of an important, and indeed the principal, part of the railway lines which the State, by such grant, intended to promote before the Constitution of 1869 was adopted.

That this state of facts presents a contract

between the company and the State within the protection of the Constitution of the United States has long since ceased to be an open question (*Fletcher vs. Peck*, 6 *Cranch*, 87, 137; *New Jersey vs. Wilson*, 7 *Cranch*, 164; *Terrett vs. Taylor*, 9 *Cranch*, 43; *Town of Pawlett vs. Clarke*, 9 *Cranch*, 292; *Dartmouth College Case*, 4 *Wheat.*, 518; *Society, etc., vs. New Haven*, 8 *Wheat.*, 464; *Gordon vs. Appeal Tax Court*, 3 *Howard*, 133; *State Bank of Ohio vs. Knoop*, 16 *How.*, 369; *Dodge vs. Woolsey*, 18 *How.*, 331; *Jefferson Branch Bank vs. Skelley*, 1 *Black*, 436; *McGee vs. Mathis*, 4 *Wall.*, 143; *Van Hoffman vs. City of Quincy*, 4 *Wall.*, 552; *Home of the Friendless vs. Rouse*, 8 *Wall.*, 430; *Wilmington R. R. vs. Reid*, 13 *Wall.*, 264; *White vs. Hart*, 13 *Wall.*, 652; *Davis vs. Gray*, 16 *Wall.*, 203; *Humphrey vs. Pegues*, 16 *Wall.*, 244; *Farrington vs. Tennessee*, 95 *U. S.*, 679; *New Jersey vs. Yard*, 95 *U. S.*, 104; *Moore vs. Robbins*, 96 *U. S.*, 530; *United States vs. Schurz*, 102 *U. S.*, 378; *Asylum vs. New Orleans*, 105 *U. S.*, 362; *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 *U. S.*, 650; *New Orleans Water Works vs. Rivers*, 115 *U. S.*, 674; *Louisville Gas Co. vs. Citizens' Gas Co.*, 115

U. S., 683; *St. Tammany Water Works Co. vs. New Orleans Water Works Co.*, 120 U. S., 64; *Noble vs. Union River Logging Co.*, 147 U. S., 165; *Monongahela Navigation Co. vs. United States*, 148 U. S., 312). And the protection extends to executory as well as executed contracts (*Fletcher vs. Peck*, 6 Cranch, 136, 137; *Hall vs. Wisconsin*, 103 U. S., 5); and to implied as well as express contracts (*Fisk vs. Jefferson Police Jury*, 116 U. S., 131), and to contracts to which the State is a party as well as to contracts between private individuals (*United States ex rel. Wolff vs. New Orleans*, 103 U. S., 358; *Hall vs. Wisconsin*, 103 U. S., 5; *Davis vs. Gray*, 16 Wall., 203). And the protection is as effectual against the impairment of the contract by a State Constitution as by a statute or any other act of the State (*M. & M. R. Co. vs. McClure*, 10 Wall., 511; *White vs. Hart*, 13 Wall., 652; *Delmas vs. Ins. Co.*, 14 Wall., 661; *Gunn vs. Barry*, 15 Wall., 610; *Williams vs. Louisiana*, 103 U. S., 637; *Durkee vs. Board of Liquidation*, 103 U. S., 646; *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 650; *Bier vs. McGee*, 148 U. S., 140; *Davis vs. Gray*, 16 Wall., 203).

In *Davis vs. Gray, supra*, this Court had occasion to consider the effect of the Constitution of 1869, upon land grants theretofore made by the State of Texas in aid of the construction of railroads, where it was contended by the State that such laws were repealed by that Constitution notwithstanding the protection afforded by the Constitution of the United States to contracts created thereby and arising thereunder. In that case it was said (16 Wall, p. 232):

"That the act of incorporation and the
 "land grant here in question were contracts
 "is too well settled in this Court to require
 "discussion (*Fletcher vs. Peck*, 6 Cranch,
 "137; *New Jersey vs. Wilson*, 7 *Id.*, 166;
Dartmouth College vs. Woodward, 4
Wheat., 518; *State Bank vs. Knoop*, 16
How., 369). As such they were within
 "the protection of that clause of the Con-
 "stitution of the United States which de-
 "clares that no State shall pass any law
 "impairing the obligation of contracts. The
 "ordinance of 1869 and the Constitution
 "adopted in that year, so far as they con-
 "cern the question under consideration, are
 "nullities and may be laid out of view (*Van*
Hoffman vs. The City of Quincy, 4 Wall.,
 "535). When a State becomes a party to a
 "contract, as in the case before us, the same
 "rules of law are applied to her as to pri-

"vate persons under like circumstances.
"When she or her representatives are prop-
"erly brought into the forum of litigation,
"neither she nor they can assert any right
"or immunity as incident to her political
"sovereignty (Curran vs. State of Arkansas,
"15 How, 308)."

That case, dealing as it does with the identical Constitution and many other questions involved in this case, is especially important, since, as we submit, it is decisive in our favor of the questions now presented. It placed beyond controversy in this Court, and should have put at rest everywhere, the proposition that the State of Texas, by adopting the Constitution of 1869 (as it then claimed, and as the State authorities persist in claiming), impaired the contract right acquired by railroad companies under their charters and the laws theretofore adopted to the lands granted to them by the State. It also seems to have satisfied every one, except the District Judge who tried the case, that the requirement of the laws in question with respect to construction were merely *conditions subsequent* annexed to the grant, and that the lands were not forfeited without a direct proceeding for that pur-

pose instituted before they were earned. Upon this point the Court said (16 Wall., 229, 230):

"The title of the company is therefore
"unaffected by the breach of any condition
"annexed to the grant.

"But suppose there had been such
"breaches, as is insisted by the counsel for
"the appellants, the result must still be the
"same.

"Except as to a small portion of the land
"in question the legal title is yet in the
"State. Whatever may be the right of the
"company it is wholly equitable in its
"character. With a few exceptions, which
"have no applicability in this case, the
"same rules apply in equity to equitable
"estates as are applied at law to legal es-
"tates. They are alike descendible, devis-
"able, alienable and barable.

"There is a wide distinction between a
"condition precedent, where no title has
"vested and none is to vest until the condi-
"tion is performed, and a condition subse-
"quent, operating by way of defeasance.
"In the former case equity can give no re-
"lief. The failure to perform is an inevi-
"table bar. No right can ever vest. The
"result is very different where the condition
"is subsequent. There equity will inter-
"pose and relieve against the forfeiture
"upon the principle of compensation, where
"that principle can be applied, giving dam-

" ages, if damages should be given, and the
 " proper amount can be ascertained. By
 " the common law a freehold estate could
 " not be created without livery of seizin, and
 " it could not be determined without some
 " act *in pais* of equal notoriety. Conditions
 " subsequent are not favored in the law, and
 " when they are sought to be enforced in an
 " action at law there must have been a re-
 " entry, or something equivalent to it, or
 " the suit must fail. The right to sue at
 " law for the breach is not alienable. The
 " action must be brought by the grantor or
 " some one in privity of blood with him.
 " In *Dumper's case* it was decided that a
 " condition not to alien without license is
 " finally determined by the first license
 " given.

" Here the controlling consideration is
 " that the performance of all the conditions
 " not performed was prevented by the State
 " herself. By plunging into the war, and
 " prosecuting it, she confessedly rendered it
 " impossible for the company to fulfill dur-
 " ing its continuance. This is alleged in
 " the bill, and admitted by the demurrer."

And at page 228 :

" The real estate of a corporation is a dis-
 " tinct thing from its franchises. But the
 " right to acquire and sell real estate is a
 " franchise, and the right to acquire the par-

"ticular real estate designated in the
"charter of this company, and here in
"question, is within that category. It
"might, therefore, well be doubted whether
"this right could be taken from the com-
"pany without an appropriate proceeding
"instituted for that purpose, and prosecuted
"to judgment by the State. But the view
"which we take of the case renders it un-
"necessary to pursue the subject."

The subject of the paragraph last quoted was pursued by this Court in *Van Wyck vs. Knevals*, 106 U. S. 360; *S. L., etc., R. Co. vs. McGee*, 115 U. S., 469-473, and in *Bybee vs. Oregon, etc., R. Co.*, 139 U. S., 663, 675, and clearly ruled against the views of the District Judge. Indeed, his ruling upon the point was in the face of a prior decision of the State Supreme Court (*G., H. & S. A. Ry. Co. vs. State of Texas*, 81 Tex., 572), and of course was not sustained by either the Court of Civil Appeals or the Supreme Court in this case.

This company had not merely organized and commenced the work it was incorporated to carry on, but had completed the principal part of its line before the Constitution of 1869 was adopted. As shown by the findings of the District Judge

(Record, p. 30), the company had 125 miles of its main line completed and in operation on June 15th, 1869—it having completed the fifth section of twenty-five miles on or before that date—and how much more it had in process of construction and nearing completion at that time the record does not show, but it must have been considerable in view of the fact that several additional sections of the main line were completed and put in operation soon after the date last mentioned. It had also acquired, prior to the adoption of the Constitution, and had in operation, that part of its Austin branch extending from the junction with the main line at Hempstead to the Town of Brenham, a distance of twenty-five miles, which was originally constructed by the Washington County Railroad Company and afterwards purchased by this company. In other words, much the greater part of the undertaking of the company by its acts of incorporation had been performed, and the public benefit sought to be accomplished by the legislation of the State in granting the lands to this company had been in a large measure secured, when the Constitution was adopted. This presents, therefore, a much stronger case than appears in many other instances where rights of

this character have been sustained. Even the Supreme Court of Texas has, in times past, held that a public grant, when accepted by the expenditure of money, becomes an inviolable contract. In *Rio Grande R. Co. vs. Brownsville*, 45 Tex., 88, it was said (p. 96):

" But, in addition to this defect in the bill,
" it plainly appears from the statement of
" facts that appellee had consented to the
" use of its streets by appellant. This was
" not denied. The ground upon which ap-
" pellee relies is not that it had not given its
" assent to the use of its streets by appel-
" lant, but that it had subsequently with-
" drawn and revoked such consent. There
" is nothing in the statute authorizing the
" authorities of the cities and towns, after
" agreeing with railway companies as to the
" point or points at which the latter may
" construct their roads, to withdraw from or
" annul such agreement at their option.
" That they have agreed to let the company
" make its own selection would not seem to
" alter the case. If they may revoke such
" consent, which, however, we are not called
" upon to decide in this case, it should ap-
" pear it was done, and notice of it given
" the company before any action was had or
" expenditure was made on the faith of the
" consent or agreement. But nothing of the
" kind is alleged in the petition, or has been

" shown by the evidence. On the contrary,
 " the inference to be drawn from the bill it-
 " self is that appellant must have desig-
 " nated and surveyed its line, and had, prob-
 " ably, commenced work within the city
 " limits before the repeal of the ordinance
 " authorizing it to make its road on any
 " street it might select, as shown by the
 " statement of facts. If so, the repeal of
 " the ordinance granting appellant the priv-
 " ilege of selecting and appropriating any of
 " the streets and alleys of the city it chose
 " was clearly inoperative and void."

We may quote also the language of this Court
 in *Red Rock vs. Henry*, 106 U.S., 596, where it is
 said (p. 604):

" There is another consideration which is
 " entitled, in our opinion, to some weight,
 " and that is that, before the Act of 1870
 " was passed, the railroad company had
 " made considerable progress in performing
 " the conditions upon which the Town of
 " Red Rock had agreed to issue its bonds.
 " It had located its line of road according
 " to the proposition made by the town, and
 " had for more than two months been en-
 " gaged in constructing its road upon that
 " line. It is true it was under no binding
 " contract with the town to go on and com-
 " plete the line, but it had unmistakably
 " manifested its purpose to do so, and had

" expended and was expending large sums
" of money in an effort to comply with the
" conditions upon which the town had
" agreed to issue the bonds. If, under
" these circumstances, the Legislature had
" withdrawn the authority of the town to
" issue its bonds or had imposed new con-
" ditions upon the issue, it would have been
" an act of bad faith. If possible, we should
" give such a construction to the act of the
" Legislature as would relieve the State
" from such an imputation."

It has been contended by the State, and may be contended again, that the General Act of January 30th, 1854, was a mere bounty law, repealable at the pleasure of the Legislature. While this company is clearly entitled to the land in question under the Special Act of September 21st, 1866 (*post*, p. LVIII.), independently of the general Act of January 30th, 1854, it is also entitled to it under the latter act extended to it as it was by the special Act of January 23d, 1856, as we have seen. We submit that any suggestion that the general act was a bounty law repealable at the will of the Legislature is altogether without force. It presents a case altogether different from that of *Salt Co. vs. East Saginaw*, 13 Wall., 373, relied on by the State

upon this point. It was not decided even in that case that a State can, by the repeal of a bounty law, impair or destroy rights which had accrued before the repeal. A general act to promote the construction of railroads is not a mere bounty law. It discharges a duty which the State owes to its inhabitants; it imposes onerous obligations on the grantee; it secures valuable benefits to the grantor; indeed, it is a part of the duty of the State to have its inhabitants supplied with public highways, and in modern times with railroads. The duty is ordinarily performed through railroad corporations which are regarded and treated as quasi-public agencies. When the legislation in Texas was passed the State was without railroads and undeveloped. It had millions of acres of public lands with no present value and over which hostile tribes of Indians roamed. Railroads were the only means of developing these lands and attracting immigration to the State. No line of railroad extended to or near Austin, the capitol of the State, and the Austin branch of this company was the first, and for nearly ten years the only line of railway reaching that city. It was to encourage the construction of this line and other lines for the development of the

State in order to open up its lands to settlement and develop its resources that the grant in question was made. The building of the road was a most adequate consideration for the grant. That such grant, even so far as it depended upon general law, was not, when it had been accepted and largely earned by the construction of an important part of the line, a mere bounty law, repealable at the will of the Legislature, seems to be a proposition that ought not to require citation of authority. But the language of this Court in a recent case is so applicable that we will quote it. In *United States vs. Denver, etc., Ry. Co.*, 150 U. S., 1, in speaking of a general Act of Congress, the Court said (p. 8) :

"The general nature and purpose of the
 "Act of 1875 were manifestly to pro-
 "mote the building of railroads through the
 "immense public domain remaining unset-
 "tled and undeveloped at the time of its
 "passage. It was not a mere bounty for
 "the benefit of the railroads that might ac-
 "cept its provisions, but was legislation
 "intended to promote the interests of the
 "government in opening to settlement and
 "in enhancing the value of those public
 "lands through or near which such rail-
 "roads might be constructed. To induce
 "the investment of capital in the construc-

"tion of railroads through the public do-
"main, Congress had previously granted
"special rights," etc.

And at page 14 the Court says:

"It is undoubtedly, as urged by the
"plaintiffs in error, the well-settled rule of
"this Court that public grants are con-
"strued strictly against the grantees,
"but they are not to be so construed
"as to defeat the intent of the Leg-
"islature, or to withhold what is given
"either expressly or by necessary or fair
"implication. In *Winona and St. Peter*
"*Railroad vs. Barney*, 113 U. S., 618, 625,
"Mr. Justice FIELD, speaking for the Court,
"thus states the rule upon this subject:
"The acts making the grants * * *
"are to receive such a construction as will
"carry out the intent of Congress, however
"difficult it might be to give full effect to
"the language used if the grants were by
"instruments of private conveyance. To
"ascertain that intent we must look to the
"condition of the country when the acts
"were passed, as well as to the purposes
"declared on their face, and read all parts
"of them together.

"Looking to the condition of the country
"and the purposes intended to be accom-
"plished by the act, this language of the
"Court furnishes the proper rule of con-
"struction of the Act of 1875. When an

"act, operating as a general law and manifesting clearly the intention of Congress to secure public advantages or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted (*Bradley vs. New York and New Haven Railroad*, 21 Connecticut, 294; *Pierce on Railroads*, 491)."

In view of the general branching privileges conferred upon the company by its original act of incorporation passed March 11th, 1848, the specific authority conferred upon the company by the Act of February 7th, 1853, to construct the Austin branch; the extension of the grant of sixteen sections of land per mile made by the general Act of January 30th, 1854, by the special Act of January 23d, 1856, to this company for the construction of its Austin line, as well as its main line, on condition that it should surrender its general branching privi-

leges; the extension from time to time granted the company by the special acts of the Legislature for the construction of its line, as required by the laws making the grants, and the preservation by such laws of the rights of the company; the extension granted by the general acts of January 11th, 1862, upon conditions specially imposed upon this company, all of which were fully complied with; the specific grant made by the special Act of September 21st, 1866; the extension of all the laws relating to the subject by the General Act of November 13th, 1866; the confirmation of the purchase of the Washington County Railroad by the Constitutional Convention of 1868, and the reiteration by said convention of the right to build to Austin, as well as the extension of time granted by that convention; the waiver of all grounds of forfeiture that may have theretofore existed by the special Act of August 15th, 1870, as well as the confirmation by that act also of the purchase of the Washington County Railroad and the reiteration again thereby of the right to build the line to Austin; the completion by the company of more than 125 miles of its main line, and the acquisition of a line constituting about 25 miles

of the Austin branch before the adoption of the Constitution of 1869; the issuance of the certificates as provided by said acts from time to time by the executive department charged with the enforcement of said acts and invested with the exclusive jurisdiction of determining the fact of construction as required thereby; the location of certificates and the survey of the lands by the State's officers; the filing of the field-notes regularly in the General Land Office; the platting of the surveys upon the maps, and the recognition of their validity upon the records of the State and by all departments of the State for twenty years; the annual collection by the State of the taxes assessed upon the lands as the property of the company; and in view of the contract and vested right acquired by the company by reason of these facts to the lands in question, which right is clearly within the protection of the Constitution of the United States, as settled by repeated decisions of this Court, the question naturally arises, how the State Courts could have reached the conclusion that the Constitution of 1869 was effective to impair and take away this right. With that inquiry we will next proceed.

IV.

The Texas Constitution of 1869, as construed by the State Court, impairs the company's contract right to the lands in question, and this result is not avoided by the assumption by that Court of a ground of decision or line of reasoning inconsistent with the provisions of the contract, as evidenced by the legislative acts and the ordinances of the Constitutional Convention.

As already suggested, there does not seem to be room to doubt that the Court of Civil Appeals bases its judgment substantially upon the broad ground that the Constitution of 1869 repealed the laws granting the company the lands in question; and this, although the company had constructed the greater part of its line before that Constitution was adopted and in reliance upon the land grants theretofore made it, and had thereby secured, as shown by the authorities cited under the preceding point, a contract and vested right to such lands. Such, undoubtedly, was meant by the Court in its reference to the

then recent decisions: *H. & T. C. Ry. Co., vs. State*, 34 S. W. Rep., 734 (89 Tex., 294); *Quinlan vs. H. & T. C. Ry. Co.*, 34 S. W. Rep., 738 (89 Tex., 356); and *G. H. & S. A. Ry. Co. vs. State*, 34 S. W. Rep., 746 (89 Tex., 340). In the case last mentioned the Supreme Court distinctly held that the Constitution of 1869 repealed all laws then in force granting lands to encourage the construction of railroads; though in the Quinlan case it left open for determination, on a new trial which it ordered, the question whether such repeal had the effect to deprive the company of the lands granted to it if it should be shown on such trial that it had organized and commenced work and expended money in the enterprise before the adoption of the repealing Constitution. These cases were referred to as determining "many of the important questions of law involved" in this case, and this was, undoubtedly, one of the questions referred to, and which the Court of Civil Appeals understood had been determined in those cases. It was, in fact, the only question arising in this case which had been determined in those cases *adversely* to the company; and since the Court referred to them for reasons for the

affirmance of the judgment of the District Court against the appellants it would seem to follow it had specially in view this question. It is true that in the Quinlan case the Supreme Court held, contrary to the view of the District Court in this case, that the Act of November 13th, 1866, continuing the land-grant laws in force for ten years, was not void, but was in accordance with the Constitution of the State then in force. But, evidently, it was not upon this point that the case was cited, since, as said before, notwithstanding that point was ruled in favor of appellants by the Supreme Court, the Court of Civil Appeals affirmed the judgment in this case upon the only remaining ground—which was that the laws had been repealed by the Constitution of 1869. The other case (*H. & T. C. Ry. Co. vs. State*, 89 Texas, 294) simply held that the Receiver of the Federal Court, in whose custody the property was at the time that suit was brought, was not a necessary party, and that, notwithstanding the lands were in the custody of the Federal Court, the State Court had jurisdiction to entertain the suit involving the title. It was, therefore, cited by the Court of Civil Appeals against appellants on their

contention in this case that the Receiver was a necessary party and that the District Court was without jurisdiction. It seems entirely clear, therefore, that the object, and the only object, the Court of Civil Appeals had, or could have had, in citing the case mentioned as settling "many of the important questions of law involved" in this case was to indicate that it regarded them [as settling—*first*, that the Receiver was not a necessary party, and that the State Court had jurisdiction notwithstanding the receivership; and, *second*, that the Constitution of 1869 repealed the laws granting lands to the Houston and Texas Central Railway Co., as well as all other land-grant laws then in force, since these were the only points involved in this case which were ruled against these appellants in the cases referred to.

The Court then proceeded to consider the additional or peculiar features of this case, and in so doing, after reciting the purchase of the Washington County Railroad, the passage of the Act of August 15th, 1870, and the extension of the road to Austin after the Constitution of 1869, the location of the certificates in the Texas and Pacific reservation, states as the questions to be

decided : " Were the certificates valid ? If so, were the locations valid ? " The last question it found unnecessary to decide. It referred to the Act of August 15th, 1870, as " the Act which " authorized the extension of the Washington " County Railroad from Brenham to Austin," and held that the Constitution of 1869 then stood in the way of whatever new power that act attempted to confer upon the company to acquire land by building the road to Austin. It then asks the further question : " Did the power to construct the Austin line exist independent of the Act of 1870 ? " It then practically conceded that such power did exist, and that, while the right to build the Austin line had been " retained " by the company, the right to acquire sixteen sections of land for every mile of such road was not ; and obviously the only reason in the Court's mind why the right to the land granted had not been " retained " was because the Constitution of 1869 had taken it away. It is true that the Court, in this connection, refers to the fact that the general Act of January 30, 1854, denied to the company the land grant for branch roads. But in this it seems to have excluded from consideration the specific extension by the Act of January 23,

1856, to the Austin line, of the grant made by the general Act of January 30, 1854, as well as the indisputable grant for the Austin branch, as well as the main line made by the special Act of September 21, 1866. As already shown under the preceding point, the grant of sixteen sections per mile, made by the general Act of January 30, 1854, was made to apply to the Austin line of this company by the special Act of January 23, 1856, as effectually as if it had been expressly conferred by the general act and as if the provision denying lands to branch roads had not been incorporated in the general act. How was it in view of the Act of January 23, 1856, and of the Act of September 21, 1866, that the company "retained" the right given it by early laws to construct the Austin line and did not "retain" the lands granted by those laws for the construction of that line? The question admits of but one answer, and that is that, in view of the Court of Civil Appeals, the Constitution repealed those laws so far as they granted lands, but did not repeal them or other laws so far as they gave the right to construct the Austin line.

Can we be mistaken about this, and can it be

that the Court of Civil Appeals meant to hold and to base its judgment upon the sole ground that the company was not authorized to construct the line in question until the Act of August 15, 1870, was passed? We submit that its language admits of no such interpretation, but on the contrary clearly indicates that the ground of the ruling was as we have stated. The State Supreme Court evidently understood it as we do, for that Court does not write opinions in refusing applications for writ of error except where it places its decision upon grounds essentially differing from those given by the Court of Civil Appeals in their decision in the case. If the Supreme Court had understood that the Court of Civil Appeals based its judgment upon the ground that the company was not authorized by legislation in force when the Constitution of 1869 was adopted, or until the Act of August 15th, 1870, was passed to build the line in question, then there would have been no occasion for it to specify in a written opinion that it refused the writ of error upon that ground, because this would have been understood without it, and the Court, no doubt, would have adhered to the practice always fol-

lowed of refusing the writ of error without a written opinion where the reasons for such ruling were the same as those given by the Court of Civil Appeals in affirming the judgment. But the Supreme Court understanding, as we do, the Court of Civil Appeals as holding that the company was not entitled to the lands for the sole reason that the laws granting them had been repealed by the Constitution of 1869, it preferred to base its action in refusing a writ of error upon the ground that the company was without authority prior to the Act of August 15th, 1870, to build the line in question. It seems to us entirely clear, for these reasons, that the Court of Civil Appeals decided, and meant to be understood as deciding, that the company had the right, under the laws enacted prior to the Constitution of 1869, to build the line in question, but that the Constitution of 1869 repealed all laws then in force granting lands for the constructing of such line.

We shall now, however, for the sake of the argument, take the other view, and proceed upon the assumption that the Court of Civil Appeals based its judgment upon the same ground as that stated by the Supreme Court in its opinion

refusing the writ of error. The Supreme Court doubtless preferred to rest its judgment upon some ground, if any could be found, that apparently would not involve the holding that this company had acquired a right to the lands in question under laws passed prior to the Constitution of 1869. It could not hold, as the District Judge did, that the company had lost its right to the land grant in question by the failure to construct its road as rapidly as some of the acts, subsequently waived, had required. It realized, no doubt, that this inquiry was not open to the courts; that the executive department had been invested by the laws granting the lands with the exclusive jurisdiction of ascertaining the facts with respect to construction, and the time of construction; that such facts had been determined by the department invested with exclusive jurisdiction to determine them; that upon such determination the certificates had been issued, the lands surveyed and the certificates located, and that the road had been built and in operation a great many years before, and that there was then no legal evidence inconsistent with the facts found by the executive department. It also realized that if there had been

any failure with respect to the time of construction, and that a ground of forfeiture had on that account at one time existed, no proceedings to declare it had ever been taken, but the company had been permitted to build the road and earn the lands ; and especially that default in such respects on the part of the company, and all ground for forfeiture on that account, if any ever existed, had been expressly waived by the Legislature. In order, therefore, to sustain the judgment, the Court was required to hold either that the Constitution of 1869 was effective to impair the contract between the company and the State, or that no such contract existed, and it took the latter view, while the Court of Civil Appeals had taken the former. But we have already seen (*ante*, pp. 58-61) that this Court has the right to inquire and determine for itself, independently of the views of the State Court, whether, as a matter of fact, any contract did exist. That there was such a contract has been, we think, fully demonstrated. Taking the unlimited branching privileges conferred upon the company by the original act of incorporation, approved March 11, 1848, the

specific authority to construct the Austin Branch conferred by the Special Act of February 7, 1853, the distinct reservation and recognition of the right to construct that branch in the Act of January 23, 1856, the extension by the latter act to the Austin branch of the grant made by the General Act of 1854, the indisputable grant to the Austin line, as well as the main line, made by the Act of September 21st, 1866, the purchase of the Washington County Railroad and the ratification and confirmation of such purchase by the ordinances of the Constitutional Convention, passed August 29th, 1868, and the Act of August 15th, 1870, and there is no room whatever to doubt that a clear, definite contract (so far as public grants and their acceptance and action upon them can constitute a contract) between this company and the State, for the lands in question, did exist. In order, therefore, to hold that this state of facts did not create a contract, it became necessary for the Court to ignore or eliminate some of those elements of the contract, and which it did by ignoring and treating as void the declaration of the Constitutional Convention recognizing and confirming the purchase of the Washington County Railroad, and

by assuming that the said railroad did not constitute a part of the lines of the Houston and Texas Central Railway Company at the time of the adoption of the Constitution of 1869. We might concede that the Court was right upon both of these points, and still its judgment was wrong, as we shall endeavor to show under a subsequent point in this argument. But if it was wrong upon either of these positions the inquiry need proceed no further; and we shall, therefore, consider those questions before proceeding to our contention that, without the ordinances of the Constitutional Convention and without legislative authority for the purchase of the Washington County Road prior to the adoption of the Constitution of 1869, nevertheless the company was entitled to the land grant for the line in question, since the Legislature, by the Act of August 15, 1870, confirmed and authorized, if it had not before been confirmed and authorized, the purchase of the Washington County road, and that such confirmation and authority related back to the time of the purchase and gave it validity from the first.

V.

The declaration of the Constitutional Convention of 1868 recognizing the purchase of the Washington County Railroad and making it a part of the Houston and Texas Central Railway and authorizing the extension of the line to Austin was valid.

The Supreme Court of Texas in Quinlan vs. the Houston and Texas Central Railway Company, 89 Tex., 356, held that the Convention assembled under the Acts of Congress, commonly known as the "Reconstruction Acts" (*14 Stats. at Large*, pp. 428, 2, 14; *15 Stats. at Large*, pp. 41, 85, 344; *16 Stats. at Large*, p. 40), was without any power to legislate or to do anything more than frame a Constitution to be submitted to a vote of the people, and that, therefore, the ordinances brought in question in that case, as well as all other ordinances passed by that convention, were mere nullities. The Court, therefore, in this case, ignored the ordinance or declaration of August 29th, 1868 (*post*, p. LXIII.), confirming and recognizing the valid-

ity of the purchase of the Washington County Railroad, and making it a part of the Houston and Texas Central Railway, and reiterating the authority to extend the branch to Austin.

Every convention that ever assembled in the State of Texas before or since exercised the powers that were exercised by the Convention of 1868 to pass ordinances, and in that way to legislate to a certain extent. It was supposed until the recent decision before referred to (invalidating a railroad land grant that had remained unquestioned for many years) that the validity of such proceedings was settled.

The convention which framed the Constitution adopted by the State upon its admission into the Union passed such ordinances, and one of these was considered by the Supreme Court in *Stewart vs. Crosby*, 15 Tex., 546, decided in 1855 and held valid; but it appears from the opinion that the ordinance there drawn in question was submitted to the vote of the people with the Constitution.

The next convention was that of 1861, through which the secession of the State was attempted, and it, like the other conventions, passed many

ordinances of a legislative character, none of which were submitted to a vote of the people except the Ordinance of Secession. But all of these are, doubtless, void as having been in aid of the rebellion and in attempted derogation of the powers of the National Government. So the Convention of 1866, called to renounce the action of the Convention of 1861, and to re-adjust and restore the relations of the State with the Union, also passed many ordinances of a legislative character, none of which were submitted to a vote of the people, while the amendments to the Constitution passed by that convention were submitted to a vote and adopted.

The validity of the ordinances of this convention, although not submitted to a vote of the people, was recognized by the Supreme Court of the State in *Ryan vs. Flint*, 30 Tex., 382; *McClelland vs. Sauter*, Id., 497; *Maloney vs. Roberts*, 32 Tex., 139; *Haddock vs. Cocheren*, Id., 276, and *Waters vs. Waters*, 33 Tex., 50; and the validity of such an ordinance was expressly sustained by the State Supreme Court in *Grigsby vs. Peak*, 57 Tex., 142. The convention which framed the present Constitution of the State (known as the Constitution of 1876), like

its predecessors, passed ordinances of a legislative character, including an ordinance preserving from forfeiture the land grants theretofore made to railroad companies, none of which ordinances were submitted to a vote of the people, though one of them provided that the ordinances should not be valid unless the Constitution should be adopted by the people.

The convention which framed the Constitution of 1869 and passed the ordinance in question passed a great number of ordinances of a legislative character, creating new counties, granting charters, etc. No Legislature sat in the State between 1866 and 1870. During that period, or subsequent to the Reconstruction Acts of 1867, the State was subject to military government, and the Convention of 1868, called in pursuance of those acts, was the only body of that period of a legislative character. It was the only assembly of the people, the only body capable of expressing their will. It assembled under peculiar conditions, and the circumstances surrounding it were wholly dissimilar from those attending any other similar body, except, of course, the conventions held in other Southern States during the same period. It consisted of

the representatives of the people who were without other representation. Other conventions in other times were called by people who had other legislative machinery—that of the ordinary legislative body—to enact laws for them. Under ordinary circumstances the people can look to the regular legislative assemblies for the enactment of general legislation, and it may not be unreasonable, therefore, for a convention assembled under such circumstances for the purpose of framing a Constitution to be restricted to that work and required to leave general legislation to the regular legislative body. But here there was no Legislature—no other assembly of the people—to enact laws for them, and none was possible. The civil government of the State had been, in effect, abolished by the Reconstruction Acts and as a result of the war, and this convention was assembled as the representatives of the people to restore the State Government. While it may be true, as held by the State Supreme Court, that the power to legislate was not expressly conferred upon this convention by the Reconstruction Acts of Congress, it does not follow that they were without such power. Certainly the power was not forbidden, and, this

being so, it was, we submit, under the circumstances, inherent in the body, and, indeed, we think it is implied from the acts under which the convention assembled. The first act of the series—that of March 2d, 1867 (14 Stats. at Large, p. 428)—after dividing the Southern States into military districts, and providing for their government by military authorities, simply provided in Section 5 that the States should not be entitled to representation in Congress until they should have adopted the Constitution framed by a convention of delegates chosen by the class of voters specified therein, and had ratified the Fourteenth Amendment to the National Constitution. No provision was made by that act for the calling of such convention, though the next act of the series—that of March 23d, 1867 (14 Stats. at Large, p. 2)—provided for the registration of the voters and the election of the delegates under the supervision of the military authorities, and the convention was referred to in the act as “a convention for “the purpose of establishing a Constitution and “*Civil Government for such State,*” etc.; and in Section 4 it was further provided that, upon notification of their election, the convention

should assemble, and, after organization, should "proceed to frame a Constitution and Civil Government," etc.

The Convention of Delegates elected in pursuance of these acts assembled at Austin June 1st, 1868, and adjourned August 31st, 1868; convened again on December 7th, 1868, and finally adjourned on the 6th of February, 1869. In pursuance of the Act of Congress, approved April 10th, 1869 (15 Stat. at Large, p. 84), the President submitted the Constitution framed by the convention to a vote of the people at an election held on the 30th day of November and the 1st, 2d and 3d days of December, 1869, when it was adopted; and it was accepted by Congress by an act approved March 30th, 1870 (16 Stats. at Large, p. 80). At the same election State, district and county officers named in the new Constitution and Representatives in Congress were chosen. The Legislature elected at said election assembled at Austin February 8th, 1870, and ratified the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and elected Senators, and then adjourned February 24th, 1870. It appears, therefore, that the Legislature which rati-

fied the amendments to the Constitution and which elected the Senators who were admitted upon the adoption of the Constitution, had been elected, assembled and did these acts, and finally adjourned, before the Constitution was accepted by Congress, until which time it did not take effect.

The whole proceeding was anomalous. The power of Congress to declare an existing State government (feeble and imperfect though it might be) unlawful, and that, too, when the State was a member of the Union, and as held repeatedly by this Court never out of the Union, as well as the power of Congress to provide for the registration of voters of the State and to call an election of delegates for the purpose of framing a Constitution for the State, would ordinarily be disputed. Here, however, it was resorted to as a means demanded by the necessities of the case and as a result of the conditions growing out of the war. It was not a time for indulging in refinements respecting constitutional powers of the Legislative Assemblies, and when the restoration of civil government and the relations between the States of the Union was the controlling object. It would seem that the power of the Convention of 1868-9 to

pass the ordinances in question, and the other ordinances adopted by it, was about as clear as the power of Congress to pass the reconstruction acts. As already pointed out, there was no legislative body in the State—no assembly of the people to enact legislation—and none was possible under the circumstances. The convention was assembled, not merely for the purpose of framing a Constitution, but to ORGANIZE A CIVIL GOVERNMENT. Should rights which had been granted, and which the people of the State were willing to preserve, be lost because of the inability of the grantees to perform the conditions through no fault of their own, but wholly through the fault of the State? The people were without representation, and there was no other body than the Convention of 1868 to express the will of the people respecting such matters. The State was required by every suggestion of honesty and fairness to save this and other railway companies from the forfeiture of the grants made them upon conditions which they had been prevented from complying with by the State's own wrong in engaging in the rebellion. This, as well as many other questions dealt with by the convention, was a local matter in which the

people of the State alone were interested, and they could only express their will through the delegates assembled in this convention. The conditions were most peculiar, and no narrow view of the powers of the convention to deal with local matters should be taken, especially when they were along the line of justice and fairness and designed to relieve the innocent victims of the State's wrong from the effect of the State's own wrongful action. Again, the very first Legislature that assembled after the Constitution of 1869 was accepted by Congress reiterated the action taken by the convention in this instance by passing the Act of August 15th, 1870, for the relief of this company.

There is another consideration of prime importance in this connection. So far as the ordinances under consideration are material to the question now before the Court, they merely evidenced the consent of the State to the purchase of the Washington County Railroad and the making of it a part of the line which the company was authorized to own and maintain; and reiterated the previous authority to extend to Austin. It is shown by the ordinance as well as by the Act of August 15th, 1870, that the

State was willing to accept this, and regarded it as within the general objects for which the company was created and as a proper means of securing the then all-important object of a line of railroad connecting the capital city of the State with tide water and with the outer world. There was no other means or agency except the convention through which the State could express its consent to the transaction and thus hasten the accomplishment of an object so important to the public welfare. Under these circumstances we do insist that the ordinance was effective at least as an evidence of the consent of the State that one of its corporations might purchase the works of another. It may be true that, so far as the ordinance provided for the settlement and adjustment of the indebtedness of the company to the State, it was of a legislative character in a larger sense, but with the validity of that provision we are not now concerned, though we contend, upon the reasons herein suggested, that all the provisions of the ordinance were within the legitimate and necessary powers of the convention.

If we are correct in our contention that the ordinance in question was within the powers of

the convention, or is valid at least to the extent that it evidenced the consent of the State to the purchase of the Washington County Railroad and the making of it as a part of this company's Austin line, then, of course, the inquiry is at an end, since it would then appear that the company had 25 miles of its Austin line in operation before the Constitution of 1869 was adopted, and that the construction subsequently of the line from Brenham to Austin would, under the ordinance or the authority conferred by the previous acts, be merely the completion of the Austin Branch.

Before leaving this branch of the case we may observe that this Court had occasion to consider in *Pacific Railroad Company vs. McGuire*, 20 Wall., 36, an ordinance passed by the Convention of 1865 which framed the Constitution of Missouri, adopted at the close of the war, and proceeded upon the assumption that the ordinance was a law of the state, within the meaning of the Constitution, which denies to States the power to pass any law impairing the obligation of contracts, though it was held invalid as contravening that provision of the National Constitution. But it does not appear from the report of the case

whether the ordinance was submitted to a vote of the people, nor are we familiar with the circumstances under which the convention passing it was assembled.

VI.

Independently of the ordinances of the Constitutional Convention of 1868 the Washington County Railroad was lawfully a part of this company's Austin branch prior to the adoption of the Constitution of 1869, and the subsequent construction of the line now in question was merely the completion of that branch.

The controlling purpose of the legislation of Texas prior to the war, and the main object of the people, was to secure the construction of important trunk lines of railway across the State, especially lines extending from tide water on Buffalo Bayou and Galveston Bay to the northern border on Red River, such as the Houston and Texas Central, intersecting and connecting with other trunk lines extending from the northeastern boundary of the State westward through the northern part of the State to the Pacific Ocean, like the Memphis, El Paso and Pacific Railway—now the Texas and Pacific—and a line from tide water on Buffalo Bayou westward through the southern part of the State, like the

Buffalo Bayou, Brazos and Colorado Railway (now the Galveston, Harrisburg and San Antonio Railway, extending from Houston to El Paso), to a point of connection in the western part of the State with the through line to the Pacific Ocean. This was undoubtedly the great scheme of the State during that period with respect to railroads. While the State desired all the lines practicable, either long or short, its main object was the construction of the important trunk lines mentioned, as evidenced by the fact that the grant made by the general Act of January 30th, 1854, was limited to main and denied to branch lines, and did not extend to short roads. But the State was without a line of railroad to Austin, its capital, and in order to secure this an exception to the general rule denying aid to branch lines was made in favor of the Houston and Texas Central Railway Company, as we have seen, by the special Act of January 23d, 1856 (*post*, p. XXXI.), which extended to that company for its Austin branch the land made by the general Act of January 30th, 1854, for main lines only.

It is a part of the history of the State that, with the single exception of the Washington

County Railroad, there was, at the beginning of the war, no line of railroad in operation in the State, except such parts of the three trunk lines mentioned as had then been constructed—viz., the Houston and Texas Central Railway, from Buffalo Bayou towards the Red River, on the north as far as Millican, a distance of nearly one hundred miles; the Buffalo Bayou, Brazos and Colorado Railway, from Buffalo Bayou westward, in the southern part of the State, to Columbus, something near the same distance; and the Memphis, El Paso and Pacific, from the northeastern part of the State, near navigation on the Red River in Louisiana, for some distance westward towards the Pacific Ocean. When the Washington County Railroad Company was incorporated, in 1856, for the construction of a line from Brenham to a connection with the main line of the Houston and Texas Central at Hempstead, the latter line was completed and in operation within ten miles of Hempstead, and was completed there early in 1858 (Record, 73). The Washington County Railroad was, therefore, the means of drawing the much-desired line from tide water that much nearer the capital of the State. It was along the very line that the

Houston and Texas Central Railway Company was authorized to follow towards Austin. The purchase, therefore, of the Washington County road, and the merging of it into the Houston and Texas Central, was a substantial step toward the accomplishment of one of the important objects of the State at that time—viz., the extension of a line to the capital of the State. It should be borne in mind, in considering legislation of that period, that the jealousy of corporate power developed in recent times did not then exist, and the limitations upon such powers with respect to the purchase of or consolidation with other lines were not recognized or applied with the same strictness then as in more recent times. While, of course, these circumstances could not change the law upon the subject, nevertheless it seems to us that it is not out of place to regard them in construing charters granted and powers conferred upon railroad corporations during that period. It is safe to say that the Legislatures incorporating this company and conferring upon it its various rights and powers did not doubt its power to purchase a line, such as the Washington County road, existing along the route the

company was authorized to occupy; but assumed, and no doubt intended to confer upon it, all the corporate powers necessary to the accomplishment of its general objects of completing the line specified, whether such objects were attained by the construction of the whole line or by the purchase of a short road along the route and making it a part of the line. Certainly it was not to the interest of the State to require this company, in the construction of its Austin branch, to parallel the Washington County Railroad, thereby earning, as it could by so doing, the grant of sixteen sections per mile for such parallel road, when there was no necessity for it, and when there had already been a similar grant made for the existing line. Had this been done the company would have acquired for the construction of that part of the line paralleling the Washington County road about 250,000 acres of land for work that would have been of no advantage to the State and that would have ruined the investment made in the Washington County road, and would have presented the folly of two lines closely paralleled for a distance of twenty-five miles when there was such great necessity for judicious expenditure in railroad construction.

in order that the greatest possible part of the State could be benefited thereby.

It is not sufficient to say that this does not meet the question of corporate power. Ordinarily it might not; but, under the circumstances here existing, it meets and answers it fully. The State may not be benefited by the consolidation of two existing lines of railroad under the conditions of the present day, and, therefore, the consent of the State thereto is not to be presumed or inferred from uncertain grants in corporate charters. But the powers of this company are to be considered in the light of the conditions that existed when it was created, and when the legislation relating to it was enacted, and the general object and purpose of the State is to be kept in view. Here it was obviously to the advantage of the State that the Washington County Railroad should be merged into the Houston and Texas Central Railway; first, because the through line was thus brought twenty-five miles nearer in its course to the State capital; and, second, because the State thereby saved something like 250,000 acres of land, which would have been lost, as well as the destruction of the value of the Washington County Railroad, which

would have been followed by the construction of a parallel line from Hempstead to Austin via Brenham, which was the direct route. In such a case the power of the corporation ought not to be restricted by any narrow construction. Reading it in the light of the facts and circumstances at the time the transaction occurred, it is obviously to the interest of the public and the State that this power should be recognized, and the Court should adopt that construction that would result in great benefit rather than injury to the public as well as to the corporation.

We insist that, aside from any special powers conferred upon these corporations by the acts relating to them, under which authority to purchase the Washington County road may be, as we believe, justly claimed, the purchase was within the general scheme contemplated by the State in the charter of the company and in the legislation of the State during that period, and that it was in pursuance of and a long step toward the fulfillment of one of the important objects for which the company was created and the completion of its line of road promoted by the State. This, we submit, is apparent from the line of road the

company was authorized to construct and the desire of the State for a line to its capital, and was, therefore, within the implied powers of the company.

Let us now consider whether there existed in the charter of the company *express* power to purchase the Washington County road. The Act of March 11th, 1848, originally incorporating this company, in Section 1 invested the company "with capacity to make contracts, * * * to grant and to receive, and, generally, to do and perform all such acts and things as may be necessary or proper for or incident to the fulfillment of its obligations," etc. (*post*, p. I.). Power in the same language was conferred upon the Washington County Railroad Company by Section 2 of the act incorporating it (*post*, p. XXXVII.). It was invested "with capacity in said corporate name to make contracts, * * * to grant and receive, and, generally, to do and perform all such acts as may be necessary and proper for or incident to the fulfillment of its obligations," etc., and the company was further authorized to borrow money, issue its bonds, etc. Section 9 of the special Act of February 14th,

1852, relating to the Houston and Texas Central Railway Company (*post*, p. XII.), and Section 12 of the act incorporating the Washington County Railroad Company (*post*, p. XLIV.), are in substantially, if not identically, the same language, and read as follows:

“ This company is hereby required at all
 “ reasonable times and for a reasonable
 “ compensation to draw over their road the
 “ passengers, merchandise and cars of any
 “ other railroad corporation which has been
 “ or may hereafter be authorized by the
 “ Legislature to enter with their railroad
 “ and connect with the railroad of this
 “ company, and if the respective com-
 “ panies shall be unable to agree upon the
 “ compensation aforesaid it shall be the
 “ duty of the president of each company to se-
 “ lect, each, one man as commissioner, and the
 “ two commissioners so selected shall choose
 “ a third, in case of disagreement, neither of
 “ whom shall be a stockholder in either road
 “ or interested therein, and they shall fix
 “ the rates, which shall not be changed for
 “ one year from the time of going into
 “ effect; the said commissioner shall also
 “ fix the stated periods at which the said
 “ cars are to be drawn as aforesaid, having
 “ reference to the convenience and interests
 “ of said corporation and the public who
 “ will be accommodated thereby; the right

" or power is specially conferred on this
" company to connect and contract with any
" railroad company chartered by this State
" for the performance of like transport, and
" in case of disagreement between said
" companies the same shall be referred and
" settled as aforesaid, to be binding for one
" year as aforesaid."

While the sections just quoted may not be sufficient as *express* authority for this company to purchase the Washington County road, they do evince an intention upon the part of the Legislature that, whether they might agree to consolidate or not, the companies should be compelled to afford the public the advantages of a continuous line, even though they preserved their separate organizations and corporate existence. It goes to show the desire of the Legislature for a practically continuous line at all events, and that the purchase of the Washington County Railroad was not in contravention of the objects of the legislation relating to the companies. The Washington County Railroad occupied the only practicable route for the Austin branch of the Houston and Texas Central, and is about the nearest point of the main line to Austin. From Houston to Hempstead the main line goes directly towards

Austin, and from Hempstead it makes a rather sharp turn northward. Looking to the location of the roads and considering that the purchase of the Washington County road was merely toward the accomplishment of the objects for which the company was created, and considering the powers that the companies had under their respective charters, we think the case comes fairly within the decision of this Court in *Branch vs. Jesup*, 106 U. S., 468, although in that case one of the corporations concerned had express authority by its charter to make the transaction in question, but the other was confessedly without such power. Still, the transaction was in furtherance of the objects sought by the acts creating the purchasing company, since the purchased line occupied a part of its route. Here we have not only the occupation of the route by the Washington County road, but also the controlling object of securing the line extending to the capital of the State, which was then without any railroad facilities whatever, and the purchase of the Washington County road was, as already said, a long step toward the accomplishment of that object.

Suppose the Houston and Texas Central Rail-

way Company had employed an individual or some corporation to construct, under contract, for it, that part of its Austin line extending from Hempstead to Brenham, and deliver it in a completed condition, no one would deny its right to do so or its ownership of the line. It is to be observed also that the State Courts in this case do not say, and we do not understand them to decide, that the purchase of the Washington County road was *ultra vires*. If such had been their view, doubtless they would have so stated. They put their decision rather upon the ground that the construction of the line from Brenham to Austin was a separate and independent enterprise authorized for the first time by the Act of August 15th, 1870, and while the Constitution of 1869 was in force. We do not understand this as necessarily holding in effect that the purchase was unauthorized, but they deal with it as a new enterprise, just as would have been the authority to construct a branch line to Fort Worth or to some other point. In other words, they say, in effect, that the particular line, or part of line, for which the grant was made, was a new and additional line, and, the Constitution being in force, no land grant could be claimed for it.

However that may be, undoubtedly this Court can and must determine for itself, as we have seen, whether the Washington County Railroad had been merged in and was a part of the Houston and Texas Central Railway when the Constitution of 1869 was adopted, in order to determine whether the company had the right to the lands in question prior to that Constitution by extending its branch to Austin.

There is another consideration of controlling importance in determining whether the purchase of the Washington County road came within the powers of the company or was embraced in the general objects for which it was created, and that is that the authorities of the State, and the very Governor over whose veto the Act of August 15th, 1870, was passed, appointed an engineer to inspect the line in question upon its completion, and on whose report showing such completion certificates for these lands were issued and located. No question was then raised by the Governor known to be hostile to the railroad land-grant policy of the State respecting the ownership of the Washington County Railroad and its lawful existence as a part of the Houston and Texas

Central Railway, and it has never since been in any manner questioned by the State or by its authorities unless it can be said to have been drawn in question in this case. The line contemplated by the charter of and the special acts relating to the company has been completed and in operation over twenty-five years, and all the benefits contemplated by the State have been abundantly realized. The line extends from Buffalo Bayou to the Red River on the northern border, and from a junction at Hempstead to the capitol at Austin. This is the line sought by the State in the legislation relating to this company, and that the obligations of the company have been substantially complied with there is no doubt. We only know that a short section of the line was once the Washington County Railroad by reference to ancient legislative proceedings. Upon completion of the road the State recognized the performance upon the part of the company of the contract and promptly issued the certificates. Its officers surveyed the land. It received the field-notes in its General Land Office as valid certificates, platted the land as belonging to the company upon its maps, and recognized the ownership of the company to the

fullest extent for more than twenty years. It levied taxes upon it as the property of the company from year to year; it authorized the company to mortgage the lands, to borrow money upon them, and thus encouraged honest investment of money in building the roads which the State so much needed. The mortgages have been foreclosed, the lands sold, and they are now held by an innocent purchaser. Under these circumstances it does seem that the powers of the corporation, with respect to the purchase of this road, should not be denied upon any technical reasons which all must concede were never considered as objections to the transaction at the time it occurred.

VII.

Conceding for the sake of the argument that the purchase of the Washington County Railroad was ultra vires and that the ordinances of the Constitutional Convention of 1868 confirming it were void, it is nevertheless true that it was ratified by the act passed August 15th, 1870, and thereby legalized from the beginning, and the transaction is therefore to be treated as if the Washington County Railroad were a part of the Houston and Texas Central when the Constitution of 1869 was adopted.

We shall now proceed upon the assumption, for the sake of the argument, that the purchase of the Washington County Railroad was unauthorized and that the ordinances of the Convention which framed the Constitution of 1869 were void. Looking then to the situation in the most favorable aspect to the State conceivable, and we find this. The company had completed prior to the adoption of the Constitution of 1869, and had then in operation, more than 125 miles of its main

line, and owned and had in operation by purchase 25 miles of its Austin branch. Although we may assume that this purchase was unauthorized, it was nevertheless an accomplished fact. The company was then proceeding diligently with the prosecution of its work. It was clearly entitled under the existing law (certainly by the Act of September 21st, 1866, if not by the Act of January 23d, 1856) to the grant of sixteen sections of land per mile for the construction of its Austin branch. It had been prevented, as was recognized by this Court in *Davis vs. Gray* (16 Wall., 203), by the wrong of the State in plunging into the war, from completing its road and securing the lands which had been granted to it. It was, we may further concede for the sake of the argument, then in default, but through the wrong of the State and not its own fault, in the matter of completing its line as expeditiously as the laws required. We may further assume, for the same purpose, that a ground of forfeiture existed in favor of the State by the failure of the company with respect to construction, although it is evident, by decisions of this Court in the case referred to, that the State by its own wrong was debarred from claiming

such forfeiture. *But whatever may have been the right of the State to declare such forfeiture it had not been exercised.* No judicial proceeding had been, or ever was, taken for that purpose, nor had any act of the Legislature equivalent to a judgment of office found at common law been passed; and that one of these was necessary is too well settled by the decisions of this Court to admit of question (*St. L., etc., R. Co. vs. McGee*, 115 U. S., 469; *Van Wyke vs. Kneavals*, 106 U. S., 360; *Bybee vs. Oregon, etc., R. Co.*, 139 U. S., 663), and seems also to have been settled by a decision of the Supreme Court of Texas (*G., H. & S. A. Ry. Co. vs. State*, 81 Tex., 572). Nothing whatever was done by the State, by judicial proceedings, by legislative enactment, or otherwise, indicating an intention to enforce any ground of forfeiture that might have existed.

Taking the view then most favorable to the State, it appears that when the Constitution of 1869 was adopted the company was diligently engaged in the prosecution of the work which had been interrupted by the wrongful conduct of the State in engaging in the war; that the company had failed to complete its road as rapidly as required by prior laws and was in default in

that respect since the ordinance of the convention of 1868 giving it further time were, we will assume, void; but that no action had ever been taken by the State to enforce any ground of forfeiture. It will scarcely be contended by anyone, except the District Judge who tried this case, that the company had then lost its right in the land granted, without any action of the State to enforce the forfeiture. It held the grant (still assuming the view for the State) as it had always held it, but subject to the power of the State, if it should deem proper, to enforce a forfeiture for default in construction, but in reliance upon the good faith of the State to voluntarily relieve it of the grounds of forfeiture, which the State by its own wrongful action had brought about. No forfeiture of lands granted to railroad companies for failure to construct their lines as rapidly as the law required, or otherwise than for failure to alienate (Sec. 7, Art. X.), was attempted in the Constitution of 1869. On the contrary, we have seen that the convention which framed that Constitution attempted to waive such grounds so far as this company is concerned, and a reference to its proceedings will show that it attempted to waive them as to other compa-

nies. Under these circumstances it will scarcely be contended, we apprehend, that the Constitution worked a forfeiture upon such grants, though it is contended that it stopped the earning of lands thereafter by repealing all laws granting them.

It would seem to follow from this situation, as a matter of course, that upon the adoption of the Constitution of 1869 this company still held its right to the land grant, subject to the assumed power of the State to forfeit the same for a failure to construct the line, unless, of course, the Constitution had the power to take away the right, not by forfeiture, for it did not attempt that, but by repealing the laws granting the lands. The Legislature had the same power after the adoption of the Constitution of 1869 that it had before to waive any ground of forfeiture that may have existed against the company for failure to construct the line. There was nothing in the Constitution limiting the power of the Legislature in that respect. To illustrate the matter more clearly, let us leave out of view for the present the Austin branch, and look to the main line of the company, and assume that the company was in default in the construction

thereof when the Constitution was adopted. Who will deny that the Legislature had power, after the Constitution was adopted, as well as before, to waive the ground of forfeiture and allow the company to acquire lands by completing its road under an extension of time given for that purpose, unless, of course, the Constitution repealed the laws granting the lands?

And then, again, what was there in the Constitution of 1869 to deprive the Legislature of the power to ratify the purchase of the Washington County Railroad, and make it as much a part of the Houston and Texas Central as any other section of the company's line?

It was, according to the State's own contention (and upon the assumption that the purchase was *ultra vires* and that the ordinance confirming it was void), just this situation that existed when the Act of August 15th, 1870, was passed. That act, as heretofore stated, recited in the preamble the purchase of the Washington County Railroad, and the desire for its immediate extension to the City of Austin, and provided in Section 1 as follows:

"That the Washington County Railroad
"is hereby made and declared to be to all

" intents and purposes in law a part of the
" Houston and Texas Central Railway, and
" shall be under the control and manage-
" ment of the Houston and Texas Central
" Railway Company in like manner as
" every other part of said railway; and the
" Houston and Texas Central Railway
" Company shall have the right to build
" and extend the part of its railway here-
" tofore known as the Washington County
" Railroad from the Town of Brenham, in the
" County of Washington, to the City of
" Austin, in the County of Travis, by the
" most eligible route to be selected by the
" engineers of the Company; and the said
" company shall also have the right to
" build a branch road diverging from the
" main trunk at some point in Navarro
" County and striking Red River at such
" point as will enable said railway com-
" pany to make a connection with any rail-
" road which may be built to the said
" River from the northward; and the said
" Houston and Texas Central Railway Com-
" pany by reason of the construction of said
" railway from the Town of Brenham to the
" City of Austin, and by reason of the con-
" struction of said branch from Navarro
" County to Red River, shall have and
" enjoy all the rights, privileges, grants
" and benefits that are now or may at any
" time hereafter be secured to any railroad
" company in the State of Texas by any

" general law of the State, and shall be subject in respect to said railway and said branch to all the duties and responsibilities imposed upon said Houston and Texas Central Railway Company by its charter and by other laws of the State."

Section 4 reads as follows :

" No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the Act of the 21st of September, A. D. 1866, entitled 'An Act granting lands to the Houston and Texas Central Railway Company'; but the said company shall have and enjoy all the rights and privileges secured to it by existing laws the same as if the conditions imposed in the first section of the said Act of the 21st of September, A. D. 1866, had been in all respects complied with; provided that the land grant to the said company shall cease unless the said company shall complete their main trunk east of the Brazos River to Richland Creek in Navarro County within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the City of Austin within two years after the passage of this act."

The company, as found by the trial Court (Record, p. 30), completed its road to Richland Creek September 26th, 1871, and to Austin December 25th, 1871.

It appears, therefore, that whatever ground of forfeiture may have existed by reason of the failure of the company to construct its line as rapidly as theretofore required was distinctly and broadly waived by this act. It is always to be borne in mind that no such forfeiture had been declared; that the requirements with respect to construction were merely a condition subsequent, as held by this Court in *Davis vs. Gray, supra*, and many other cases, and that the title remained in the company in the absence of proceedings to enforce such forfeiture. It had not been enforced or declared by any provisions of the Constitution of 1869 or by other act of the State, and there was nothing whatever in that Constitution to deprive the Legislature of its power to waive it. That the Legislature under such circumstances had power to waive the ground of forfeiture is a proposition too well settled to admit of extended discussion in this Court.

Let us now consider the effect that this act had upon the purchase of the Washington

County Railroad and the extension of the Austin branch. If the Washington County road was lawfully a part of the Houston and Texas Central Railway when the Constitution of 1869 was adopted, it is evident that it was a part of the Austin branch with the same effect as if it had been constructed by the company, and that a subsequent completion to Austin was just as though the entire branch had been constructed by the company under the Acts of 1848 and 1853, giving it the right to construct the same. If it was not a part of the line in 1868, it was only because its purchase was unauthorized by the State.

Its purchase, its control and operation by this company, and its existence as a part of the company's Austin branch, were existing *facts*. Being such in fact, only the consent of the Legislature was required to make it in *law* a part of the Austin branch of this company. That consent was given broadly and without reservation by the Act of August 15th, 1870. This evidenced the consent of the State to the transaction and put its validity beyond any sort of question. Any issue respecting the power of the company to purchase the road was thereby rendered im-

possible. The State having expressed its consent by that act it was forever after debarred from denying the validity of the transaction which it expressly recognized and ratified.

That the subsequent ratification of an *ultra vires* or unauthorized contract of a corporation gives it validity and force *ab initio* is a proposition settled by a great number of authorities. The law is stated by Mr. Morawetz in his work on Private Corporations (Vol. 2, Sec. 651) as follows:

"It has frequently been held that the
"validity of a contract made by a corpora-
"tion in excess of its charter powers may
"be cured by a subsequent act of the Leg-
"islature. By such subsequent act the
"contract is made as valid as if it had been
"originally authorized. This shows that
"the want of legislative authority to enter
"into a contract in a corporate capacity
"affects the remedy merely and not the ex-
"istence of the contract itself; for the Leg-
"islature would have no power to create a
"contract between the parties where there
"was none before."

And he cites a great number of authorities and decisions in support of the statement. In speaking of the ratification of unauthorized acts

affecting the organization or existence of a corporation he says (Vol. 1, Sec. 20):

" Such subsequent ratification will not
" only legalize the existence of a corpora-
" tion formed without authority of law and
" authorize the association to act in a cor-
" porate capacity thereafter, but it may also
" cure the illegality of corporate acts per-
" formed before the act of ratification was
" passed and render such acts as valid and
" binding as if authority to perform them
" had been previously granted by the Leg-
" islature."

In *Comanche County vs. Lewis* (133 U. S., 198) this Court said:

" It is universally affirmed that when a
" Legislature has full power to create cor-
" porations, its act recognizing as valid a *de*
" *facto* corporation, whether private or mu-
" nicipal, operates to cure all defects in steps
" leading up to the organization, and makes
" a *de jure* out of what before was only a *de*
" *facto* corporation."

And in *Whitewater Valley Canal Co. vs. Val-lette* (21 Howard, 414) this Court said (p. 425):

" If the rights of the appellees depended
" upon the act of incorporation alone it would
" be difficult to resist them. But in Janu-
" ary, 1845, the Legislature of Indiana

" passed an act that recites the corporation
" had entered into a contract with Vallette
" to complete the canal, and was to be paid
" in their bonds drawing the legal interest
" in New York, and doubts were entertained
" as to the legality of the issue of these
" bonds; and thereupon it was enacted that
" all the bonds which might be issued in
" accordance with the contract existing be-
" tween the company and Vallette were
" *legalized*. A large portion of the work
" specified in the contract was performed
" after this enactment and the settlement
" under which these bonds were issued took
" place subsequently. *This act implies that*
" *there was no illegality in the fact that bonds*
" *were employed as a medium of payment for*
" *supplies of materials for, or work and*
" *labor done upon, the canal.*"

So in the present case after the passage of the act recognizing the Washington County road as a part of the company's Austin branch and removing all doubts on that score the line was completed to Austin within the time required by the act, the certificates were issued by the State, the lands were located and for a great number of years were held by the company or its vendee without question. Does not this *imply*, as the act considered in the case from which we have

just quoted it, that there was no illegality in the purchase of the Washington County Railroad.

Then, again, in *Galveston Railroad vs. Cowdery* (11 Wall., 459), in speaking of a mortgage executed by a railroad in Texas at a time when there was no statute of that State expressly authorizing railroad companies to mortgage their roads and franchises, this Court observed (p. 474):

"Without examining how far the operative effect of a mortgage executed by a railroad company upon its road, works and franchises may extend, *per se*, without statutory aid, it is sufficient to say that in our opinion the Legislature of Texas has validated the mortgages and given them the effect which by their terms they were intended to have," and the Court held the mortgages valid and accordingly foreclosed them, when, as it now seems, the contract was clearly *ultra vires* when made.

In *Campbell vs. City of Kenosha*, 5 Wall., 194, it was held that where the Legislature of a State passes two acts, one authorizing a city to subscribe a limited amount of stock to a railroad, another authorizing it to subscribe an unlimited amount (which latter by

the Constitution it had no power to pass), and the city, professing to act under the one which authorized the unlimited amount, subscribes the limited amount, a subsequent recognition by the Legislature of the subscription as legal validates the subscription, and also that such legislative recognition might be made by implication (see, also, the *Clinton Bridge Case*, 10 Wall., 454).

That the subsequent ratification by the Legislature of a contract of a corporation in excess of its powers at the time made legalizes the contract from the beginning is a proposition which seems to be too well settled to require any extended discussion, and we shall, therefore, merely refer, without discussing them, to the following cases which support the proposition generally.

Shaw vs. Norfolk, etc., R. Co., 5 Gray (Mass.), 162.

I. G. T. R. Co. vs. Cook, 29 Ills., 237.

McAuley vs. C. C. & I. C. R. Co., 83 Ills., 348.

Bridgeport vs. Hoosatonic R. Co., 15 Conn., 475.

Bishop vs. Brainerd, 28 Conn., 289.

Meade vs. N. Y., H. & N. R. Co., 45 Conn., 199.

Shields vs. Clifton Hill Land Co., 94 Tenn., 123.

State vs. Webb., 20 So. Rep. Ala., 462.

The Court of Civil Appeals and the Supreme Court of Texas proceeded, apparently, upon the theory that because the Constitution of 1869 was in force when the Act of August 15th, 1870, was passed, the Company can claim nothing with respect to its land by virtue of the act. If the act made a *new and distinct grant of lands* and to which the company had no *previous* right a different question would be presented. But the company does not rely upon that act as *granting* it the lands. It is true that the act provided that the company should have the benefits conferred by future laws of the State, etc., but we are not concerned with that feature of it now.

Nor are we concerned with the question as to the power of the Legislature, after the adoption of the Constitution of 1869, to restore to a railroad company, theretofore incorporated and earning lands, any lands that may have been *forfeited* before the adoption of that Constitution. It is not claimed that this company had *forfeited* its right to the land grant. The most that can be claimed, or that is claimed, as we understand, upon that point, is that a *ground* of forfeiture had accrued from the de-

fault of the company in completing its road as rapidly as the law required, which default was due to the wrongful action of the State in engaging in the war. But, while such *ground* may have existed, the State had in no manner *enforced* the forfeiture. The result is, therefore, that the right to the grant remained in the company after the Constitution of 1869 was adopted, just as it was before, and subject merely to a possible ground of forfeiture to enforce which no steps were ever taken by the State and which the Legislature had the undoubted power to waive, and which it expressly waived, by the Act of August 15th, 1870. It is obvious, therefore, that this Act was not a *restoration* or *regrant* to the company of any right to lands which it had *lost* through failure on account of the wrong of the State, in complying with the conditions subsequent annexed to the grant, but was simply a *waiver* of such condition. It follows from this that unless the Constitution of 1869 was effectual to repeal the laws granting the lands to the company (a proposition already discussed) the company had the same right as it had before with respect to its lands.

What were those rights? They embraced the right of extending its main line to Red River and its branch line to the City of Austin and to receive a grant of 16 sections of land per mile for the roads thus completed. The Court of Civil Appeals concedes, and the Supreme Court does not deny, that the company retained, notwithstanding the Constitution of 1869, the right conferred, as heretofore shown, by prior laws to extend its branch to the City of Austin. But the former Court holds in effect, as we have seen, that the land grant was taken away by that Constitution while the Supreme Court held that the right to construct the road *from Brenham to Austin* was a new enterprise conferred for the first time by the Act passed August 15th, 1870—an error which we think we have already demonstrated. The company having, therefore, under the laws passed prior to 1869, the right to extend the line to Austin and receive lands therefor, had purchased 25 miles of existing road extending from its main line toward Austin, and was operating and treating it as a part of its Austin branch. It was such in fact, if not in law. If it was not such in law it was only for lack of legislative consent. This consent, as

we have seen, was expressly conferred by the Act of August 15th, 1870, whereby the purchase was confirmed and made as valid as if it had been previously authorized. The act operated upon the contract of purchase from the time the contract was made and settles forever any question respecting the power of the company to enter into it. We insist, therefore, that the Washington County road was in fact a part of the Austin branch of this company when the Constitution was adopted, and the State, by the Act of August 15th, 1870, concluded all inquiry into the legality of that fact, and thereby made the Washington County road a part of the Austin branch from the date of its purchase, with the right in the company by reason of the laws passed prior to 1869 to complete the same to the City of Austin as the branch it was by said laws authorized to construct, and for which it was entitled to the land grant.

This did not enlarge the grant theretofore made to the company by a single acre. In fact, as already pointed out, it diminished that grant to the extent of about 250,000 acres which were saved to the State, since the company could have paralleled the

Washington County road with its Austin branch and earned, not only every acre of land in question, but 16 sections per mile besides for 25 miles paralleling the Washington County road. The line from Brenham to Austin was not, as held by the Supreme Court, any *separate* and *distinct* line from that which the company had been previously authorized to construct. It was obviously the Austin branch of the company to the same extent as if it had also paralleled the Washington County road from Brenham to Hempstead.

Let us repeat, as it is of controlling importance and should be borne in mind throughout, that the Act of August 15th, 1870, did not *restore* to the company any land grant which it had *forfeited*, but only *waived* the possible *ground* of forfeiture which might have been defeated by the company by setting up the wrong of the State which caused it; that it did not authorize the company to construct any *additional* line of railroad or any line which it had not been previously authorized to construct; that it did not *add* a single acre to the grant of the company, but *diminished* the grant, and thereby saved to the State many thousand acres

of land; and that, since it did not grant any lands, it did not contravene any provision of the Constitution then in force; that it merely waived a possible ground of forfeiture which the Legislature, beyond any sort of question, had the right to waive; and expressed the consent of the State to the prior purchase of the Washington County road, thereby recognizing a *fact* previously existing—to wit, that the company had acquired the Washington County road, thereby securing an extension of its Austin line from the point of junction at Hempstead to Brenham, a distance of 25 miles on a direct line toward Austin.

That such was the only effect of the Act of August 15th, 1870, so far as it is material in this case, is a proposition so plain that we are left to wonder how the Courts below could have found anything in it contravening the Constitution of the State.

In conclusion, therefore, we submit as clear (1) that the company had the right to extend the branch to the City of Austin under the laws passed prior to 1869; (2) that there was made to it, for such line, a grant of 16 sections per mile thereof by the special Act of January 23d, 1856,

which extended to such branch line the grant made by the General Act of January 30th, 1854; or if not by this act, then undoubtedly by the special Act of September 21st, 1866; (3) that by the acceptance of its charter and these grants, and by the completion of an important part of its line before the adoption of the Constitution of 1869, the company had acquired a contract and vested right to the land grant which could not be impaired or taken away by that Constitution; (4) that whatever default the company was in with respect to the construction of its line when the Constitution of 1869 was adopted was the result of the State's own wrong in engaging in the war; (5) that all default with respect to the construction from whatever cause, and all grounds that may have existed, if any, for forfeiture, was waived (as previous defaults had been theretofore waived) by the Act of August 15th, 1870; (6) that the company, prior to the adoption of the Constitution of 1869, had purchased the Washington County road and had it in operation as a part of its Austin branch when that Constitution was adopted; (7) that such purchase was within the general purview of the objects of the State in creating the company and

the laws relating to it, and was, therefore, authorized, but that all doubts, if any, on this point were removed by the ordinance of August 29th, 1868, passed by the convention which framed the Constitution; (8) that, even if it be true that the purchase of the Washington County road was not authorized when made, and that the ordinance of the Constitutional Convention ratifying it was void, nevertheless it was ratified by the Act of August 15th, 1870, and thereby validated *ab initio*, and all questions respecting the original validity of the transaction were forever concluded; (9) that since the Act of August 15th, 1870, did not *enlarge* the grant theretofore existing, but on the contrary *diminished* the grant to which the company was entitled, after as well as before the adoption of the Constitution of 1869, and merely ratified the purchase of the Washington County road and the making of it a part of the Austin branch, which was a previous existing fact, and waived any supposed grounds of forfeiture, it was impossible for said act to have contravened the provision of the Constitution which denied the Legislature the power to grant lands in aid of railroads or any other provision of the Constitution; (10) that

the opinion of the Supreme Court that the lines for which the lands in question were granted was a *new and distinct* enterprise, and that, therefore, there was no contract to be impaired, was erroneous; (11) that the decision of the Court of Civil Appeals, as well as the effect of the opinion of the Supreme Court of Texas, is that the Constitution of 1869 was effectual to impair the contract right of the company to the lands in question, and (12) therefore, said Constitution in such respect is in contravention of the Constitution of the United States, especially Sec. 1, Art. 10, which denies to the States power to pass any law impairing the obligation of contracts, and Sec. 1 of Art. XIV. of the amendments, which denies to the States power to deprive any person of property without due process of law.

VIII.

**The judgment of the Court of Appeals
should be reversed and judgment should
be directed to be entered in favor of the
plaintiffs in error.**

JAMES A. BAKER,
R. S. LOVETT,
Of Counsel for Plaintiffs in Error



APPENDIX.**An Act to establish the Galveston and Red River Railway Company.**

SECTION 1. Be it enacted by the Legislature of the State of Texas, that a body politic and corporate be, and the same is hereby, created and established, under the name and style of the "Galveston and Red River Railway Company," with capacity to make contracts, to have succession and a common seal, to make by-laws for its government, and in its said corporate name to sue and be sued, to grant and to receive, and generally to do and perform all such acts and things as may be necessary or proper for, or incident to, the fulfillment of its obligations, or the maintenance of its rights under this act, and consistent with the provisions of the Constitution of this State.

SEC. 2. That the said company be, and hereby is, invested with the right of making, owning and maintaining a railway from such point on Galveston Bay, or its contiguous waters, to such point upon Red River, between the eastern boundary line of Texas and Coffee's Station, as the said company may deem most suitable, with the

privilege of making, owning and maintaining such branches to the railway as they may deem expedient.

SEC. 3. That Ebenezer Allen, and such other persons as he may associate with him for the purpose, are hereby appointed commissioners and invested with the right and privilege of forming and organizing the said company, of obtaining subscriptions to the capital stock, and distributing the shares thereof; and generally of taking such lawful measures to secure the effectual organization and successful operation of said company as they may deem expedient.

SEC. 4. That the capital stock of said company shall be divided into shares of one hundred dollars each, and the holders of such shares shall constitute the said company, and each member shall be entitled to one vote in person or by proxy for each and every share he may own, and such shares of stock shall be transferable alone upon the books of the company, which books shall be kept open for the inspection of any stockholder who may wish to examine them at the office of the company in proper business hours.

SEC. 5. That the affairs and business of the said company shall be conducted and managed

by a Board of Directors, not to exceed nine in number, who shall be elected by the company, at such time as the said commissioners may appoint, and annually thereafter ; *provided* that, in case of failure so to elect at the stated time, the Board of Directors incumbent shall continue in office until there be an election, the time for which may be fixed by said board, whereof reasonable notice shall be given.

SEC. 6. That no person shall be eligible as a director unless he be the owner of at least five shares of the capital stock. The said board shall elect a president from their number, to fill vacancies occurring from death, resignation or otherwise ; have power to appoint a secretary and such other officers as they may consider necessary, and to require security for the faithful performance of their duties ; also to prescribe the time for the payment of installments or assessments upon the stock and the amount of such installments or assessments ; to declare the forfeiture of such stock for nonpayment ; and to do or cause to be done all other lawful acts or things which they may deem necessary or proper in conducting the business of said company. A majority of said Board of Directors

shall constitute a quorum for doing business. All instruments in writing executed by the president and secretary under the seal of the company, with the consent of the Board of Directors, shall be valid and binding.

SEC. 7. That the said company shall be empowered to occupy such portions of the public lands, not exceeding one hundred yards in width, as the said railway or any of its branches, to be constructed in accordance with this act, shall pass through, and to take from the public lands contiguous thereto such metals, timber and other materials as may be useful or necessary in the construction and maintenance of their works and the prosecution of their operations or business, the company paying a reasonable compensation to the State for the said privilege.

SEC. 8. That if the said company shall not commence its operations within two years from the first day of June, 1848, and shall not have completed at least one hundred miles of the said railway within five years thereafter, then, and in such case, the rights, powers and privileges herein granted to the said company, for the construction of said railway, shall cease and be determined.

SEC. 9. That the said company shall have the right of constructing bridges and other improvements upon and over any watercourse bordering upon or crossing the said railway or any of its branches; *provided*, that the navigation of such watercourse shall not be obstructed thereby.

SEC. 10. That if any person shall negligently or designedly injure or destroy any of the fixtures, buildings, machines or improvements of the company, or any portion of the said railway or its branches, he shall be subject to indictment therefor, and on conviction may be punished by fine and imprisonment, and shall be also liable to the said company in a civil action for damages.

SEC. 11. That no provision contained in this act shall be so construed as to grant or allow any banking privileges, or any privilege of issuing any species of paper to circulate as money to the aforesaid company.

SEC. 12. That the said company shall have the right to charge five cents per mile for passengers and no more, and shall have the right to charge not exceeding fifty cents on the hundred pounds for freight for every hundred miles that the same may be transported on said railway;

provided, however, that the Legislature of the State of Texas shall have the right to fix and regulate the price that said company shall charge for carrying the public mails of the United States.

Approved March 11, 1848.

(The above act is published as Chapter 204 of the special laws passed by the Second Legislature of Texas, pp. 370-373).

An Act Supplementary to the Act to Establish the Galveston and Red River Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that all that portion of the act to establish the Galveston and Red River Railway Company, approved the 11th of March, 1848, contained in the 4th Section, and all the subsequent sections thereof, be, and the same are hereby, repealed; and, whereas, it is desirable to preserve uniformity in the several acts establishing railway companies passed by this Legislature, the following provisions are hereby adopted at the instance of the Commissioners

named in the said original act for the government, formation and observance of the company thereby established.

SEC. 2. That the meetings of the Commissioners provided for by this act and the said original act, may be held at such times and places as they may appoint, and at said meetings the Commissioners may act in person or by proxy.

SEC. 3. The capital stock of said company, to consist of all its property, real and personal, franchises and rights to property, shall be divided into shares of one hundred dollars each, each share entitling the owner thereof to one vote by himself, or by proxy, at all meetings of said company; that said shares shall be deemed personal estate, and shall be transferable by any conveyance in writing, recorded by the treasurer in books kept by him at his office, or in such other manner as the by-laws of said company shall provide.

SEC. 4. The immediate government and direction of the affairs of said company shall be vested in a board of not less than six directors, who shall elect one of their own number as president of said company; no

person shall be eligible to the office of director unless an owner or subscriber of at least five shares of the stock of said company. The directors shall have the power to fill any vacancy that may occur in said board from non-election, death or otherwise, and may appoint a secretary, treasurer and such other officers and agents as they may consider necessary, and prescribe and require bonds for the faithful performance of their duties. They may, if not otherwise provided by the by-laws, determine the manner of conducting all meetings, the number of members that shall constitute a quorum, and to do, or cause to be done, all other lawful matters and things which they may deem necessary and proper in conducting the matters of the company. They shall keep, or cause to be kept, accurate records of all meetings of the directors and company and accurate books of accounts of the receipts and expenditures of the company, and all other books necessary and proper to be kept by such company, which shall be open to the inspection of the stock-holders. A majority of the Board of Directors shall have the authority of a full board, and all conveyances and contracts in writing, executed by the president and countersigned by the secretary, or

any other officer or person authorized by the directors under the seal of the company, and in pursuance of a vote of said directors, shall be valid and binding.

SEC. 5. The shares may be disposed of and books open for subscription thereto in such manner and on such terms as said Commissioners shall determine will be best for the interest of said company, and any agreement in writing by which any person shall become a subscriber to the capital stock of said company may be enforced against him according to its terms; and, if any subscriber shall fail to pay any amount due upon shares subscribed by him according to the terms of his subscription, the directors may sell at auction and transfer to the purchaser the shares of such delinquent, and if the proceeds of sale shall not be sufficient to pay the amount due on said subscription, with interest and charges, such delinquent shall be held liable to the company for the deficiency, and if the proceeds shall exceed the amount so due, with interest and charges, said delinquent shall be entitled to the surplus.

SEC 6. It shall be lawful for the company to enter upon and purchase or otherwise take and

hold any land necessary for the purpose of establishing and constructing said railway, with all necessary depots and other buildings ; and, if they shall not be able to obtain said lands by agreement with the owner thereof, they shall pay therefor such compensation as shall be determined in the manner provided by the following section ; *provided*, that the land so taken for the roadbed shall not exceed two hundred feet in width, and for depots and other buildings only such further width as shall be needed for such purposes.

SEC. 7. Any person, when land has been taken as aforesaid without agreement or satisfactory compensation, may apply to the District Court of the county in which said land is situated, for the appointment of, and the Court shall thereupon appoint, three disinterested freeholders of the county, who shall appoint a time and place to hear the applicant and the company, to whom shall be given by said freeholders reasonable notice of said time and place ; and said freeholders shall, after being sworn, and after due hearing of the parties, determine the amount of compensation, if any, to which the applicant may be entitled, and make return of their award to

the next succeeding term of said Court; and said award, if not rejected by said Court for sufficient cause then shown, shall be entered up as the judgment of said Court. In determining the question of compensation, said freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to the other lands and property of the owner by the establishment of said railway; and, if the amount of compensation awarded by said freeholders shall not exceed the amount offered by said company to the owner prior to said application to the Court, the applicant shall pay the costs of the proceedings; otherwise, the company shall pay the same.

SEC. 8. It shall be the duty of said company, whenever any State or county road now by law established shall be crossed by the track of said railway, to make and keep in repair good and sufficient causeways at such crossings; and in all cases where any person shall own lands on both sides of said railway, and there shall be no other convenient access from one part to the other, such owner shall have the right of passage free of cost at all reasonable times across the track of said railway.

SEC. 9. This company is hereby required at all reasonable times and for a reasonable compensation to draw over their road the passengers, merchandise and cars of any other railroad corporation which has been, or may hereafter be, authorized by the Legislature to enter with their railroad and connect with the railroad of this company; and, if the respective companies shall be unable to agree upon the compensation aforesaid, it shall be the duty of the president of each company to select, each, one man as a Commissioner, and the two Commissioners so selected shall choose a third in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going into effect. The said Commissioners shall also fix the stated periods at which said cars are to be drawn as aforesaid, having reference to the convenience and interests of said corporation and the public who will be accommodated thereby. The right or power is specially conferred on this said company to connect and contract with any railroad company chartered by this State for the performance of like transport, and in case of disagreement be-

tween said companies the same shall be referred and settled as aforesaid, to be binding for one year as aforesaid.

SEC. 10. That said company may acquire real estate by gift or purchase, and that such Commissioners hereinbefore mentioned shall have full authority to solicit and receive subscriptions and conveyances of land to said company until the time fixed for the first meeting of said Commissioners, which authority may be then extended by said meeting; which land so obtained shall be alienated by said company in the following manner: One-fourth in six years, one-fourth in eight years, one-fourth in ten years, and the remaining one-fourth in twelve years from the time the same was acquired.

SEC. 11. If the track of this railway shall cross any navigable stream, it shall do it in such way as not to obstruct its navigation.

SEC. 12. Said company shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper to establish, not to exceed five cents per mile for passengers, and fifty cents per hundred pounds for freight for every hundred miles the same may be carried.

SEC. 13. If any person shall willfully injure or obstruct said railway or its property, such person may be punished when prosecuted by indictment for said offense in due course of law, and also liable to action by said company or any person whatever, who may suffer in person or property from said willful obstruction, for the amount of damages occasioned thereby.

SEC. 14. There shall be granted to said company eight sections of land of six hundred and forty acres each, for every mile of railway actually completed by them and ready for use; and upon the application of the president of the company, or any duly-authorized agent thereof, stating that any section of five miles, or more, of said railway has been completed and is ready for use, it shall be the duty of the Comptroller of public accounts to require the State Engineer, or a Commissioner to be appointed by the Governor, to examine said railway, and, upon his certificate that said section of said railway has been completed in a good and substantial manner and is ready for use, the Comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company land cer-

tificates to the amount of eight sections of land of six hundred and forty acres each, for each and every mile of railway thus completed and ready for use ; such certificates shall be for six hundred and forty acres each, and shall be located upon any unappropriated public domain of the State of Texas within twelve months from the issuing thereof, which date shall appear upon the face of each certificate ; and upon the return of the field-notes of any survey made by virtue of any certificate thus issued, it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name ; one-fourth of which said lands thus patented shall be alienated by the company in six years, one-fourth in eight years, one-fourth in ten years, and the other fourth in twelve years, so that the whole of the lands thus granted shall pass from the hands of the company within twelve years from the date of the patents thus issued.

SEC. 15. Said company shall be required to have a good and sufficient brake upon the hind-most cars in all trains transporting passengers or merchandise, and also permanently stationed there a trusty and skillful brakeman, under a

penalty of not exceeding the sum of one hundred dollars for each offense, to be recovered in any court of competent jurisdiction for the benefit of the State; and said company shall cause to be placed on each locomotive engine passing over their road a bell of the weight of at least thirty-five pounds, or a steam whistle, and the said bell shall be rung or the whistle blown at the distance of at least eighty rods from the place of crossing any highway or turnpike, and kept ringing or blowing until the engine has passed or stopped. Said company shall be required to construct their railroad with good T or U iron rails; *provided*, that no land shall be donated unless the company shall actually commence their road within two years, and actually complete and finish at least ten miles within three years.

SEC. 16. Nothing in this act shall be so construed as to confer banking privileges or powers of any kind whatever.

SEC. 17. If said railway shall not be commenced within five years from the passage of this act, and at least twenty miles thereof completed within six years, then this charter shall be null and void; and it is hereby provided

and declared that it shall be lawful for any other railway hereafter to be constructed to cross the said railway, or any branch thereof, or to connect at any point therewith.

SEC. 18. The said company shall have the right to take and hold so much of the public lands, not exceeding two hundred feet wide, as the said railway or any of its branches may pass through for the track thereof, and such additional width as may be absolutely necessary for any depot or other work for the purposes of the railway that the company may deem proper to establish; and, in all cases where such railway or branch shall pass through any public lands, all such land, to the depth of three miles from the exterior line of the track on each side thereof, shall be, and hereby are, reserved for the State from and after the time such track shall be fixed or designated by survey, reconnaissance or otherwise; and the said lands, as fast as the road is constructed, shall be divided into sections fronting one mile each on the road, which sections shall be numbered and the corners of such section on the road plainly marked; and of these reserved lands the company shall have the right, by virtue of any of their cer-

tificates issued in accordance with the provisions of this act, to cause to be located, surveyed and patented for their use each alternate section, such section in each instance embracing a tract of land fronting one mile on said road and extending back three miles, preserving an equal width, and the remaining sections shall continue the property of the State until disposed of by the Legislature.

Approved February 14, 1852.

(The above act is published as Chapter CXLVIII. of the Special Laws of the Fourth Legislature of Texas, pp. 142-147.)

An Act Supplementary to the Acts to Establish the Galveston and Red River Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the preliminary action of Ebenezer Allen and others associated with him as Commissioners of the Galveston and Red River Railway Company, in commencing the survey and grade of said railway at the City of Houston, is hereby confirmed.

SEC. 2. Said company is also hereby further authorized and empowered to extend said railway to the City of Galveston, and also to make and construct simultaneously with the main railway, described in the original acts establishing said company, a branch thereof towards the City of Austin, under the same restrictions and stipulations provided in said original acts, and subject to the rights of the State, to regulate the tolls by general laws.

SEC. 3. This act shall take effect immediately.

Approved February 7, 1853.

(The above act is published as Chapter XIX., pages 36, 37, of the Special Laws of the Fourth Legislature of Texas, extra session.)

**An Act to Encourage the Construction
of Railroads in Texas by Donations of
Lands.**

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company chartered by the Legislature of this State, heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railroad, shall be entitled to receive from

the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.

SEC. 2. That any railroad company having actually put under contract as much as twenty-five miles of its road, or its entire road when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office, and upon depositing with the Treasurer of the State a bond with two or more good sureties, to be approved by him in favor of the Governor of the State, in the sum of ten thousand dollars, conditioned as hereinafter required, may file an application with any district surveyor of any land district in this State, a copy of which application shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor, to survey any quantity of the public domain lying and being in such district, and subject to location and entry, not to exceed eight hundred sections; and said application shall specifically describe the lands applied for and intended to be surveyed; and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that

a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road, and, also, a certificate from the Treasurer that a bond as required by this act has been deposited in his office, said application shall exempt the land so designated from any future location, entry or pre-emption privilege until otherwise directed as hereinafter provided; provided, that no application for a survey of lands under the provisions of this act shall be made for more than six months before the completion of such section; and, if said section be not completed and notice thereof given as herein provided within six months from the time of the application, then such land applied for shall become subject to location and entry as if no such application had been made.

SEC. 3. That it shall be the duty of said company to cause to be surveyed the land so designated into sections of six hundred and forty acres each, and in square blocks of not less than six miles, unless prevented by previous surveys or a navigable stream, which surveys shall be delineated upon a map or maps, the even and odd sections being differently colored and regularly

numbered from one upwards to the full number contained in the block, and the field notes of said surveys and map or maps shall be by said company deposited with the Commissioner of the General Land Office.

SEC. 4. That the condition of the bond mentioned in the second section of this act shall be that said company will cause to be surveyed the land designated and applied for within the time limited for the construction of said section of twenty-five miles by the contract, and in the manner required by the third section of this act; and shall actually construct the said section of twenty-five miles of said road within the time mentioned in said contract, in default of which said land shall become forfeited to the use of the State, which forfeiture shall be declared by the District Court of Travis County at the first term thereafter without other formality than as hereinafter provided.

SEC. 5. That if, at the time stipulated in said contract for the completion of said section of twenty-five miles, the field notes and map or maps of the land applied for be not deposited in the General Land Office as herein required, it shall be the duty of the Commissioner to for-

ward immediately to the Treasurer of the State and the district surveyor of the land district where the land applied for is situate, a certificate of the fact, whereupon the land so applied for shall become subject to location and entry by any one as if no such application had been made; and it shall be the duty of the Treasurer ten days before the session of the District Court of Travis County to cause notice of such forfeiture to be advertised in one of the newspapers published at Austin for two successive weeks; and at said session of the District Court it shall be the duty of the Attorney-General, or, in case he be not present, of the District-Attorney, to file a motion for the forfeiture of said bond, whereupon said Court shall proceed without other citation or notice to declare said bond absolutely forfeited and to render judgment against said company and sureties for the amount of said bond, upon which judgment execution shall issue as in ordinary cases; provided, that it shall be necessary for the Attorney-General or District-Attorney to file with said motion a certified copy of said bond under the hand and seal of the Treasurer, and also a copy of the contract deposited in the General Land

Office, and a certificate of the Commissioner that said surveys and map or maps of the lands applied for have not been returned.

SEC. 6. That any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State Engineer, to examine said section of road, and if upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands, or any part thereof, shall not have been surveyed at the time said section is completed, then it shall be the duty of said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed, whereupon said company may apply to the district surveyor

of any land district in this State to survey any quantity of vacant land subject to location and entry in such district, not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered and colored as directed in the third section of this act; and upon the return of the field notes and map or maps of such surveys to the General Land Office, and the certificates so issued, it shall be the duty of the Commissioner to issue to said company patents for the odd sections of said surveys; provided, that in case the surveys are not applied for before the completion of any section of road, it shall not be necessary to deposit with the Treasurer a bond as required in the second section of this act.

SEC. 7. That fractional sections containing more than 320 acres shall be regarded as whole sections; and two fractional sections, each containing less than 320 acres, shall be taken as a whole section under the provisions of this act; and all the alternate or even sections shall be reserved to the use of the State until appropriated by law.

SEC. 8. That surveys under the provisions of this act may be made by persons employed by the company, and the field notes may be de-

posited with the Commissioner of the General Land Office without being recorded in the office of the district surveyor; provided, that the State in no case shall be liable for surveying any part of said lands, nor shall any company pay for the fees of patenting the odd sections as herein provided.

SEC. 9. That any railroad company in this State acquiring lands or other real estate by virtue of the provisions of this act, or by virtue of the provisions of any other act or charter enacted by the Legislature of the State of Texas, by purchase, donation or otherwise, shall proceed to alienate the same except so far as may be necessary to the maintenance and running of said road, in six, eight, ten and twelve years; that is, one-fourth shall be alienated in six years, one-fourth in eight years, one-fourth in ten years, and one-fourth in twelve years from the time of acquiring such lands or real estate, in such manner that the whole of such lands or real estate shall pass out of the hands of such company within twelve years from the date of its acquisition; provided, moreover, that said land and real estate shall in no instance be alienated to any other corporation, except so far as may

be necessary for the proper uses and the conduction of the business of such corporation.

SEC. 10. That if any company should neglect or fail to alienate its lands or real estate as herein directed, evidences of which alienations said company shall cause to be filed with the Secretary of State, it shall be the duty of that officer to notify the Comptroller of Public Accounts and Commissioner of the General Land Office of such failure to alienate, whereupon the Commissioner shall furnish the Comptroller with a list of the lands acquired by said company under this or any other act of the Legislature of the State, and the dates at which such lands were acquired; and the Secretary of State shall also furnish the Comptroller with a schedule of the lands owned and alienated by said company, as the same appears from the last annual return made to his office by said company, in pursuance of the general law of the State regulating railroad companies; and it shall be the duty of the Comptroller of Public Accounts, immediately upon receiving said returns, to cause to be advertised in the newspapers in the City of Austin for sale, sixty days after such advertisement, the lands therein directed to be alien-

ated, proceeding in the order in which said lands and real estate were granted or deeded to said company; and, after deducting all necessary expenses of the sale, the balance shall be deposited with the Treasurer to the credit of said company.

SEC. 11. That all the alternate or even sections of land surveyed in pursuance of the provisions of this act, or of any other act of the Legislature of this State, donating lands to any railroad company, shall be reserved to the use of the State, and not liable to locations, entries or pre-emption privileges until otherwise provided by law.

SEC. 12. That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single-track road, with the necessary turnouts; and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, accepting the provisions of this act, shall not be entitled to receive any grant of land for any branch road; provided, this act shall not be so construed as to give to any company now entitled by law to receive

eight sections of land, more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act; and such donations shall be discontinued in every case where the company or companies shall not construct or complete at least twenty-five miles of the road contemplated by their charter each year after the construction of said first-mentioned twenty-five miles of road; and further provided, that the proviso herein contained shall not extend to any railroad the terminus of which is not fixed on the Gulf Coast, the bays thereof, or on Buffalo Bayou, and that nothing in this section shall be construed as to extend the duration of any existing charter; and further provided, that the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled previous to the passage of this act; and further provided, that this act shall continue in force for the term of ten years from the time it shall take effect and no longer.

SEC. 13. That no railroad hereafter to be built shall be entitled to receive the additional sections of land herein granted unless the railings of such road shall weigh at least fifty-four pounds to the yard.

Approved January 30, 1854.

(The above act is published as Chapter XV., pages 11-15, General Laws, passed by the Fifth Legislature of Texas.)

An Act Supplemental to "An Act to Encourage the Construction of Railroads in Texas by Donations of Land."

SECTION 1. Be it enacted by the Legislature of the State of Texas, that no railroad company availing itself of the provisions of the act to which this is a supplement shall receive more than sixteen sections of land to the mile by virtue of said act, or any *proviso* therein contained. And no road benefited by said act shall receive any donation of land under its charter, or under the act to which this is a supplement, for any work not done within ten years after the passage of this act; and this act shall be in force at the

same time that the act to which this is a supplement shall take effect.

Approved January 30, 1854.

(The above act is published as Chapter XVI., page 16, General Laws, passed by the Fifth Legislature of the State of Texas.)

An Act for the Relief of the Galveston and Red River Railway Company, and Supplementary to the Several Acts Incorporating Said Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Galveston and Red River Railway Company shall have six months after the thirtieth of January, 1856, to complete the first twenty-five miles of their road, commencing at the City of Houston; and if said company shall complete said twenty-five miles within said six months after the thirtieth day of January, 1856, its failure to complete any portion of its road before that shall not operate as a forfeiture of any of the rights of said company. But said company shall be entitled to the rights, benefits and privileges granted by an

act approved January thirtieth, eighteen hundred and fifty-four, entitled "An Act to encourage the construction of railroads in Texas by donations of lands," upon the completion of said twenty-five miles within said six months, and the rights, benefits and privileges of said act shall be confined to said company; *provided* it shall construct and complete twenty-five miles of road each year after the expiration of said time; *provided*, that said company shall keep their principal office on the line of said road during the continuance of their charter, with all the books, papers and accounts of said company, which shall at all times be subject to the inspection and examination of any stockholder of said company; *and*, *provided*, that a majority of the directors of said company shall be required to reside in the State of Texas; all elections of directors and other officers shall be held in the said State; *provided further*, that said company shall be required to complete the main trunk of said road to the thirty-second degree of north latitude, or until they shall connect with some road reaching to or in the vicinity of Red River before they shall commence any branch road; *provided further*, that the Act to Regulate Railroad Companies, ap-

proved 7th February, 1853, shall apply to this charter.

SEC. 2. That upon the application of the said company, at any time, for the benefits of the acts approved January the thirtieth, eighteen hundred and fifty-four, and referred to in the first section, it shall be proven to the satisfaction of the Governor that said company has established and kept its principal office, books and papers on the line as required by the first section of this act.

SEC. 3. That upon the completion of any number of miles of said road, as required by the charter of said company and the act of January the thirtieth, eighteen hundred and fifty-four, and the issuance of any land certificates to which said company may be entitled for said completion, said company may assign said land certificates by any instrument in writing under their corporate seal and signed by their president or other authorized agent. And the assignee shall have the same rights and be governed by the same provisions as said company in respect to the locations of said certificates, and may have the patents issued on said certificates, made to him, in his own name, and the title of the assignee shall thereupon be absolute.

SEC. 4. That said company is authorized to borrow money from time to time for the construction of their railway, and to secure such loan by pledging and mortgaging the property, both real, personal and mixed, of said company, and to issue bonds with interest, warrants annexed and payable at such time and place as the directors may deem proper; and that said company shall have the right, after the location and survey or patent of said certificates, or any part of them, to mortgage, hypothecate or sell any part of said lands by any instrument in writing under their corporate seal, and signed by their president or other authorized agent. But no sale or assignment made under the third and fourth sections of this act by said company to any party with any trust reserved to said company, either expressly or impliedly, shall be valid; *and provided*, that the provisions of this section shall in no way release said company from the requirements of selling their lands within the time now required by law.

SEC. 5. That said railroad company in accepting the benefits of this act shall yield all general branching privileges, except such as are expressly granted by the provisions of its charter

to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed to any branch, and shall be required to complete its main trunk to the point on Red River contemplated in its charter, or to such point of intersection between said road and some other road running from the northern or eastern boundary of Texas towards El Paso, as shall be agreed upon between the directors of said company.

SEC. 6. That nothing in this act shall be so construed as to effect [affect] the right of the State to repeal or modify the Act of January 30th, 1854, entitled "An Act to encourage the construction of railroads in Texas by donations of land;" *provided*, that the rights to lands acquired before said repeal or modification shall in all cases be protected.

SEC. 7. That this act take effect and be in force from and after its passage.

Approved 23d January, 1856.

(The above act is published as Chapter XX., pp. 28-30, Special Laws of the Sixth Legislature of Texas.)

**An Act to Incorporate the Washington
County Railroad Company.**

SECTION 1. Be it enacted by the Legislature of the State of Texas, that James W. McDade, John Stamps, R. R. Peebles, Terrel J. Jackson, Joseph C. Wallis, A. M. Lewis, Hosea Garrett, A. M. M. Upshan, Jas. H. Stephens, W. J. Hutchins, William M. Rice, Cornelius Ennis and T. J. Allcum be, and they are hereby, appointed Commissioners to open books and receive subscriptions to the capital stock of a corporation to be styled the "Washington County Railroad Company," but they shall receive no subscription to said capital stock unless five per cent. thereof in cash shall be paid to them at the time of subscribing; and, should they receive subscriptions to said stock without such payment, they shall be personally liable to pay the same to said corporation when organized. A majority of said Commissioners shall constitute a quorum to do business, and they may hold their meetings at such times and places as a majority shall designate; *provided*, that public notice of all such meetings shall be given by publication in some newspaper printed in Washington County at least twenty days before any such meeting.

SEC. 2. That the subscribers to said capital stock, whenever they shall have elected directors in the manner hereinafter provided, shall be, and they are hereby, created and established a body corporate and politic, under the name and style of the "Washington County Railroad Company," with capacity in said corporate name to make contracts, to have succession and a common seal, to make by-laws for the government and regulation of the said company, to sue and be sued, to plead and be impleaded, to grant and receive, and generally to do and perform all such acts as may be necessary and proper for or incident to the fulfillment of its obligations, for the maintenance [maintenance] of its rights under this act, and in accordance with the Constitution and laws of the State.

SEC. 3. That the capital stock of said corporation shall be one million of dollars, and it shall have power to increase the same to two millions of dollars. The said corporation shall be, and is hereby, invested with the right of locating, constructing, owning and maintaining a railway commencing at such point on the trunk of the Galveston and Red River Railroad as said corporation shall deem most suitable, crossing the

Brazos River within the limits of Washington County, and then running by the most suitable and direct line to Brenham in said county.

SEC. 4. That the capital stock of said company shall be divided into shares of one hundred dollars each, each share entitling the owner thereof to one vote, in person, or by proxy, at all meetings of the company, and the shares shall be deemed personal estate and shall be transferable by any conveyance in writing recorded either by the treasurer in books kept by him for that purpose at his office, or by any other officer duly authorized by the directors in books kept by him at such other place as the directors may appoint; such transfers as are recorded in any other place being within ninety days communicated to the Treasurer, and by him entered on his books.

SEC. 5. That the immediate control and direction of the affairs of said corporation shall be vested in a board of not less than five directors. said directors shall elect one of their own number to be president of the company. Whenever two hundred thousand dollars of the capital stock of said corporation shall have been subscribed and five per cent. thereof shall have been paid to the

Commissioners hereinbefore named, they shall cause an election to be held by said subscribers at the Town of Chappell Hill, in Washington County, for not less than five directors, having first given public notice of the time of said election in some newspaper published in said county, after which the said Commissioners shall account for and pay over to said directors all such sums as they shall have received of the capital stock of said company, first deducting a reasonable compensation for their services as Commissioners. No person shall be eligible to the office of director unless he be a subscriber or owner of at least three shares of the capital stock. The directors shall have power to fill any vacancy in their body arising from non-election or other cause. They shall have power to appoint a clerk, treasurer or any other officers or agents as they may deem necessary, and prescribe and require bonds for the faithful performance of their duties. They may make all necessary rules and regulations for holding of meetings, and all other things they may deem proper for the carrying out the provisions of this charter and business of the company. They shall keep, or cause to be kept, correct records of all meetings of the directors

and company, and accurate books and accounts of the receipts and expenditures of the company, and all other books and accounts necessary and proper to be kept by such company, which books shall be open to the inspection of the stockholders. A majority of the Board of Directors shall have the power of a full board, and all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under the seal of the company and in pursuance of a vote of the directors, shall be valid and binding.

SEC. 6. That the directors shall have power to receive further subscriptions to the capital stock of said corporation from time to time until the full amount thereof shall have been subscribed; but five per cent. of all such subscriptions shall be paid in cash at the time of subscribing, and the directors shall be personally liable to said company for five per cent. of all subscriptions they may receive to said capital stock without such payment; *provided*, however, that said company may, by the vote of a majority of the stockholders, cause certificates of stock to be issued in payment of any debt contracted for the construction or

equipment of their road, and any agreement in writing whereby any person shall become a subscriber to the capital stock of said company shall be enforced against him according to its terms. If any subscriber shall fail to pay any amount due upon shares subscribed for by him according to the terms of his subscription, the directors may, after twenty days' public notice, sell at public auction the shares subscribed for by said delinquent, and transfer to the purchaser such shares. If the proceeds of sale shall not be sufficient to pay the amount due, with interest and charges, such delinquent shall be held liable to the company for the deficit, and if the proceeds shall exceed the amount so due, with interest and charges, he shall be entitled to the surplus.

SEC. 7. That it shall be lawful for the company to purchase and hold any land that may be necessary for the purpose of locating, constructing and maintaining said railway, with all necessary depots and other buildings, and, by their engineers or agents, enter upon and take possession of all such lands as may be necessary for the locating, constructing and maintaining said railway, and if they shall not be able to obtain such lands by agreement with the owner

they shall pay for the same such amounts as shall be determined in the manner provided for in the following section. The land so taken for the railroad shall not exceed fifty yards in width, and for depots and buildings only such further width as may be necessary.

SEC. 8. That any person from whom lands have been taken for the purposes set forth in the preceding section may apply to the District Court of the county wherein said lands are situated for the appointment of appraisers, and said Court, after proof that the president or other officers of the company has been served with a notice, describing the land, ten days before the holding of the Court, shall thereupon appoint three disinterested freeholders, citizens of the county, who shall appoint a time and place to hear the application, and the company, to whose agent or president a reasonable notice shall be given by the Court of said time and place, and said freeholders being sworn, shall, after hearing the parties, determine the amount of compensation as aforesaid and make return of their award to said Court at its next term, and said award may be confirmed or for any sufficient reason rejected by said Court in

the same manner as awards by arbitrators under a rule of court; and, if confirmed by the Court, judgments shall be rendered thereon as in other cases. In determining the amount of compensation to be paid as aforesaid, freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to the other neighboring lands of the owner by the establishment of said railway. If in any case the amount found by the arbitrators shall not exceed the sum proved to have been offered by the company to the owner prior to his application to the Court, the owner shall pay the costs of proceedings; otherwise, the company shall pay the same.

SEC. 9. That said company shall have power to borrow money on their bonds or notes at such rate as the directors deem expedient; *provided*, however, that nothing in this act shall be construed to confer banking privileges of any kind.

SEC. 10. That upon the written request of one-fourth of the stockholders the president of the company shall call a special meeting of the directors, and upon the written demand of three-fourths of the stockholders the president shall remove any one, or the whole, of the directors,

and order a new election within thirty days, which directors so elected shall hold their offices until the time prescribed for the next regular election.

SEC. 11. That if said railway is not commenced within twelve months from the first day of July, 1857, and at least ten miles are in running order within three years after its commencement, then this charter shall be null and void.

SEC. 12. That the company is hereby required at all reasonable times and for a reasonable compensation to draw over their road the passengers, merchandise and cars of any other railroad corporation which has been or may hereafter be authorized by the Legislature to enter with their railroad and connect with the railroad of this company; and, if the respective companies shall be unable to agree upon the compensation aforesaid, it shall be the duty of the president of each company to select, each, one man as a Commissioner, and the two Commissioners so selected shall choose a third, in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going

into effect. The said Commissioners shall also fix the stated periods at which said cars are to be drawn as aforesaid, having reference to the convenience and interests of said corporations and the public who shall be accommodated thereby. The right or power is specially conferred on this company to connect and contract with any company heretofore or hereafter chartered by this State for the performance of like transport, and in case of disagreement between companies the same shall be referred and settled as aforesaid, to be binding for one year as aforesaid.

SEC. 13. That this act of incorporation shall expire in ninety years unless it shall be renewed or extended.

SEC. 14. That this company shall be subject to the provisions and be entitled to the benefits of any general laws which have been or may be enacted by the State, regulating or encouraging the construction of railroads, and that this act take effect from its passage.

Approved 2d February, 1856.

(This act is published as Chapter XLIV., pages 49-53, of the Special Laws passed by the Sixth Legislature of Texas.)

An Act Amendatory of and Supplementary to an Act to Establish the Galveston and Red River Railway Company, and the Several Acts Supplemental Thereto.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Galveston and Red River Railway Company may change its name to that of the Houston and Texas Central Railway Company, and by that name may sue and be sued, grant and receive, and generally do and perform all such acts and things as they could legally do under their present name; and all acts heretofore done in said name shall be as binding upon said company and in favor of said company upon third parties in said new name as they were under the first name; and said change of name shall in no way forfeit or change any rights or liabilities now existing between said company and the State or third parties; provided, that this act shall first be accepted by the president and directors of said company and notice of said acceptance shall be filed in the office of the Secretary of State.

SEC. 2. That said company shall have the right to cross any navigable stream by ferry, bridge or otherwise, and shall have the right to acquire and exercise such ferry privileges as may be necessary for its business, and said road crossing any such stream by a good and convenient ferry shall be considered as continuous as if crossing upon a bridge; provided, that same shall not obstruct the navigation of any such stream.

SEC. 3. That a failure to complete the second section of twenty-five miles of the road of said company within one year after the construction of the first section shall not work a discontinuance as to said company of the benefits of the act entitled "An Act to encourage the construction of railroads in Texas by donations of lands," or of any other general or special laws relative to railroads, if said company shall have completed their second and third sections, amounting to at least fifty miles, at the expiration of two years after the construction of said first section.

SEC. 4. That section twelfth of the act supplementary to the act to establish the Galveston and Red River Railway Company, passed February, eighteen hundred and fifty-two, be, and the

same is hereby, amended so as to read as follows: Said company shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper to establish, not to exceed five cents per mile for passengers and fifty cents per hundred or twenty-five cents "per foot" for freight per every hundred miles the same may be carried.

SEC. 5. That this act take effect and be in force from and after its passage.

Passed September 1st, 1856.

(The above act is published as Chapter CCCLI., pages 259, 260, of the Special Laws, passed by the Sixth Legislature of Texas at its adjourned session.)

An Act for the Relief of the Houston and Texas Central Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Houston and Texas Central Railway Company be, and said company is hereby, permitted to extend their road northward, beyond the limits of the State,

into the United States Indian Territory, and the Territory of Kansas, with the consent of the political authorities of said Territory.

SEC. 2. That the failure of the Houston and Texas Central Railway Company to complete the third section of twenty-five miles of its road by the 30th day of July, 1858, shall not work a discontinuation, as to the said company, of the benefits of the act entitled "An Act to encourage "the construction of railroads in Texas by the "donation of land," or any other general laws in reference to railroads, if said company shall complete said third section by the 30th day of July, 1859; and that on the completion of subsequent sections of twenty-five miles annually after said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to sixteen sections of land per mile, contemplated in said last-mentioned act, for each section so completed; and, whenever a failure shall occur on the part of said company to complete a section within the time required, then the land, applicable to that section only, shall be forfeited, and the completion of future sections within the time contemplated by law shall entitle the company to the benefits of said last-mentioned act as fully as if

no failure had been made in completing any former section, except as to the section on which the failure occurred; *provided*, that the benefits of the provisions of any general law shall only inure to the said railroad company whilst said laws shall remain in force.

SEC. 3. That said company be, and they are hereby, authorized to raise any files or locations of land made by them which are, in the opinion of the Commissioner of the General Land Office, without the limits of the State of Texas; and that any district surveyor be authorized to survey the said lands upon any of the public domain of the State of Texas.

SEC. 4. That said company shall, within twelve months from the passage of this act, definitely determine the counties through which their road is to run, striking the Trinity River in the County of Dallas, and Red River within fifteen miles of the Town of Preston. And this act shall take effect and be in force from and after its passage.

Passed February 4th, 1858.

(The above act is published as Chapter 86, pages 94, 95, Special Laws, Seventh Legislature of Texas.)

An Act for the Relief of the Houston and Texas Central Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the failure of the Houston and Texas Central Railway Company to complete the fourth and fifth sections of twenty-five miles each of its road by the thirtieth day of July, 1861, shall not work a discontinuance, as to the said company, of the benefits of the act entitled "An Act "to encourage the construction of railroads "in Texas by the donation of land," or any other laws in reference to railroads, if said company shall complete said fourth and fifth sections by the thirtieth day of January, 1863, and shall thereafter complete twenty-five miles of its road annually, or fifty miles every two years thereafter; *provided*, said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro County, and thence to the Town of Dallas, or within one and a half miles of said town, and thence to the terminus of Red River, within fifteen miles of Preston. And said company shall have said road surveyed, staked

and permanently located to Dresden, or within one mile of said town, by the first day of April, A. D. 1862.

SEC. 2. That this act shall take effect from and after its passage.

Approved February 8th, 1861.

(The above act is published as Chapter XIII., pages 11, 12, Special Laws, passed by extra session of Eighth Legislature.)

An Act for the Relief of Companies Incorporated for Purposes of Internal Improvement, by Allowing Them Further Time for the Performance on Account of the Pending War.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the time of the continuance of the present war between the Confederate States and the United States of America shall not be computed against internal improvement companies in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do; *provided*, that this act shall not

be construed as to revive any charter of a railroad company which has been forfeited prior to the 21st day of May, 1861.

SEC. 2. The president and directors of the Houston and Texas Central Railroad Company shall, before the provisions of this act shall extend to the benefits of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for their stock—to all the rights, privileges and immunities to which they were entitled previous to, and of which they were divested by, the sale of the said road to W. J. Hutchins and others, and shall forward to the Governor of the State a copy of said resolution, signed by the president and countersigned by the secretary or treasurer, under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act; *provided*, that if the said *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock, on or before the expiration of the extension of time provided in this act for the fulfillment of the charter obligations of said company to the State, then and in that case said stockholders shall

forfeit all their rights, privileges and property interests as stockholders in said road.

SEC. 3. The president and directors of any railroad company in this State shall not have the power to sell out stockholders in said company by virtue of any law now in force, until the expiration of the time of extension provided in this act for the fulfillment of its charter obligations to the State.

SEC. 4. The provisions of any law, contrary to those of this act, shall have no force or effect so far as they may conflict with the provisions of this act, and this act shall take effect and be in force from and after its passage.

Approved January 11th, 1862.

(The above act is published as Chapter LXII., pages 43, 44, General Laws, passed by regular session of Ninth Legislature of Texas.)

An Act for the Relief of Railroad Companies.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the failure of any chartered railroad company in this State to complete any section or fraction of section of its

road, as required by the existing laws, shall not operate as a forfeiture of its charter or of the lands to which said company would be entitled, under the provisions of an act entitled "An Act "to encourage the construction of railroads in "Texas by donations of land," approved January 30th, 1854, and the several acts supplementary thereto; provided said company shall complete such section or fraction of a section as would entitle it to donations of land under existing laws within two years after the close of the present war between the Confederate States and the United States of America.

SEC. 2. That, during the time named in the first section of this act, any such company having completed and in running order twenty-five miles of its road shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road constructed, or which may hereafter be constructed and put in running order, beyond the said section of twenty-five miles; *provided*, that no company shall receive from the State more than sixteen sections of land per mile for any portion of its road now or hereafter constructed, unless otherwise provided by its charter or special provision of some law.

SEC. 3. That, upon the application of any company which may have completed any portion of its road beyond the said section of twenty-five miles, the Commissioner of the General Land Office shall issue to said company certificates for the lands to which it may be entitled under the provisions of this act, and which may have been designated and caused to be surveyed by said company in accordance with existing laws; *provided*, that this act shall not be so construed as to conflict with, or in any manner alter or change, the provisions of an act entitled "An "Act for the relief of the Memphis and El "Paso Railroad Company, and all other railroad "companies," passed March 20th, 1861.

SEC. 4. That the lands to which any such company may now be entitled in pursuance of this act may be designated, surveyed and patented at any time within two years after the passage of this act; and the president and directors of the Houston and Texas Central Railway Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for stock—to all the rights, privileges and

immunities to which they were entitled previous to, and of which they were divested by, the sale of said road to W. J. Hutchins and others, and shall forward to the Governor of the State a copy of said resolution, signed by the president, and countersigned by the secretary or treasurer, under the seal of said company; and said company shall not have the power to repeal said resolution so as to defeat the object of this act; provided, that if the said original *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock on or before the expiration of the extension of time provided in this act for railroad companies to fulfill their charter obligations to the State, then, and in that case, said stockholders shall forfeit all their rights, privileges and property interests as stockholders in said road.

SEC. 5. That this act take effect and be in force from and after its passage.

Approved January 11th, 1862.

(The above act is published as Chapter LXIX., pages 46, 47, General Laws, passed at regular session, Ninth Legislature of Texas.)

**An Act Granting Lands to the Houston
and Texas Central Railway Company.**

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, "in accordance with the provisions of the charter of said railroad company;" *provided*, that the lands heretofore drawn by said company, by virtue of an act to encourage the construction of railroads in Texas by donations of lands, "approved January 30th, 1854," be deducted from the amount of lands granted hereby; *and provided, further*, that the land certificates heretofore issued to this company on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act as if issued by virtue of its provisions; *and further provided*, that said company shall construct and put in running order a section of twenty-five miles of additional road to that now built within one year from January 1st,

1867, or fifty miles within two years from that date; and such grant of land shall be discontinued when said company shall fail to construct and complete at least twenty-five miles of the road contemplated by their charter each year after the construction of said first-mentioned fifty miles of road; *provided*, that said road shall be put in running order to Bryant's Station, and cars run regularly thereon, by the first day of September, 1867.

SEC. 2. Whenever said company shall have completed and put in running order a section of twenty-five miles or more of its road beyond the point which land has been granted and drawn, they may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer to examine said section of road, and if, upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter, and of the general laws of the State, in force at the time, regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company certificates of six hundred and forty acres each, equal to sixteen sections

per mile of road so completed; thereupon said company may apply to the district surveyor of any land district to survey any quantity of vacant land subject to location and entry, in such district, not to exceed twice the quantity of certificates so issued, and may cause to be surveyed the land so designated into sections of six hundred and forty acres each, or half sections of three hundred and twenty acres each, which surveys shall be delineated upon a map or maps, the even and odd sections and half sections, and being differently colored and regularly numbered from one upwards to the full number contained in the block; and the field notes of said survey, and map or maps, shall be by said company deposited with the Commissioner of the General Land Office, and it shall be the duty of said Land Commissioner to issue to said company patents for the odd sections and half sections of said surveys; and all the alternate or even sections and half sections shall be reserved to the use of the State until appropriated by law, and not liable to location, entrance or pre-emption privileges.

SEC. 3. That surveys under the provisions of this act shall be made by deputies and district

surveyors of the districts in which the land is situated, and the field notes shall be recorded in such district and returned to the General Land Office as other surveys; and said railroad company shall construct their road in the line heretofore prescribed by "An Act for the relief of "the Houston and Texas Central Railway Company," approved February 8th, 1861.

Approved September 21, 1866.

(The above act is published as Chapter XI., pages 33, 34, Special Laws, passed by Eleventh Legislature of Texas.)

An Act for the Benefit of Railroad Companies.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act.

SEC. 2. That the time for the alienation of the lands acquired by railroad companies heretofore shall be extended to fourteen for the alienation of

one-half of such lands, and to twenty-one years for the alienation of the other half; and in the event such alienation does not take place, the said lands shall be forfeited to the State; and companies hereafter acquiring lands shall alienate the same in fourteen and twenty-one years from the date of the acquisition, under a like penalty of forfeiture.

SEC. 3. That the benefits of this act shall not apply to any company hereafter that avails itself of the provisions of the 2d, 3d, 4th and 5th Sections of an act entitled "An Act to encourage the construction " of railroads in Texas," approved January 30th, 1854, or of the act supplementary thereto, approved February 16th, 1858.

SEC. 4. That it is not intended by the preceding section to interfere with or impair the rights which have heretofore been acquired by companies under laws heretofore in force, but to preclude companies from hereafter taking advantage of the provisions of Sections 2, 3, 4 and 5 of the Act of January 30th, 1854, and the supplementary Act thereto of 16th February, 1858; *provided*, that all tap roads over twenty-five miles long shall be entitled to the benefits of this act.

SEC. 5. That this act be in force from its passage.

Approved November 13, 1866.

(The above act is published as Chapter CLXXIV, p. 212, General Laws Eleventh Legislature of Texas.)

Declaration Respecting the Central Railroad Company.

WHEREAS, The Houston and Texas Central Railroad Company has become the owner, by purchase, of the Washington County Railroad; and,

WHEREAS, The said Houston and Texas Central Railroad Company and the Washington County Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund; and,

WHEREAS, The said Houston and Texas Central Railway is desirous to extend the Washington County Branch to the City of Austin as soon as it can be done, and to build their main trunk to Red River in the shortest time possible, and upon the best ground; and to strike Red

River at such point as will enable said company to form a connection with any railroad that may be built southward from Kansas or Missouri to Red River; and,

WHEREAS, The ability of said company to build said main trunk and branch road would be greatly increased by the consent of the State to exchange the six per cent. bonds of said companies, now held by the State for the seven per cent. gold-bearing bonds of said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted) as trustees; and,

WHEREAS, It is believed that such exchange can be made without in any manner endangering the security of the School Fund;

Therefore, be it declared by the people of Texas, in convention assembled, that the Washington County Railroad is hereby made and declared to be a branch of the Houston and Texas Central Railroad, and shall henceforth be known and called the "Western Branch of the Houston and Texas Central Railway," and shall be con-

trolled and managed by the said Houston and Texas Central Railway Company; and the Houston and Texas Central Railway Company shall have the right to extend the said western branch of their road from the Town of Brenham, in Washington County, to the City of Austin, in Travis County, by the most eligible route, as near an air line as may be practicable.

SECTION 2. For the whole amount of principal and interest due to the State by the said Houston and Texas Central Railway Company and the Washington County Railway Company on the first day of July, A. D. 1868, including the sums paid by each of said companies in the treasury warrants or bonds of the State, the Provisional Government shall accept from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest bearing bonds of said company, which said bonds are also payable in gold, and are issued, or to be issued, by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Sheperd Knapp and David S. Dodge, of the City of New York, are trustees; and the Governor shall, after making the exchange, cancel and deliver to said company the

six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railway Company now held by the State for sums borrowed from the special school fund; and the exchange of bonds and settlement herein provided for shall be made at any time between the passage of this declaration and the first day of December, A. D. 1868; provided that the said Houston and Texas Central Railway Company shall never issue an amount of the said seven per cent. bonds above described to exceed twenty thousand dollars to the mile of completed road, including such bonds as have already been issued; nor shall said company ever issue any other bond that shall rank as a first mortgage bond on their road without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The Houston and Texas Central Railway Company is hereby authorized, any former laws to the contrary notwithstanding, to build its main trunk from the present northern terminus, by the most eligible route, to be selected by the engineer or engineers of the company, to any point on Red River within thirty miles of the Town of Preston, in Grayson County.

SEC. 4. This declaration shall take effect from and after its passage; provided, that all laws and parts of laws concerning the said Houston and Texas Central Railroad, or said Washington County Railroad, not in conflict with the foregoing provisions, shall be considered as still in force; and provided, further, that the Government of the State shall be at any time authorized to interfere by such measures as may be thought necessary by the Legislature to prevent neglect of said railroads, so that the same may always remain a competent security to the State for the amount due as above set forth.

Passed August 29, 1868.

(The above is published at pages 46, 47, of the Ordinances passed by the Convention of 1868-69, which assembled under the reconstruction Acts of Congress to frame the Constitution that was adopted in 1869-70.)

**Declaration for the Relief of the Houston
and Texas Central Railway Company.**

It is hereby declared by the people of Texas in convention assembled, that the Houston and

Texas Central Railway Company shall not suffer any forfeiture of any rights secured to it by existing laws, by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robinson County, by the first day of January, A. D. 1869, as required by act of the twenty-first of September, A. D. 1866, provided said railway shall be constructed and put in good running order for the use of the public, to said Town of Calvert, by the first day of April, A. D. 1869.

Passed December 23, 1868.

(The above is published at page 59 of the Ordinances of the Constitutional Convention of 1868-1869.)

An Act for the Relief of the Houston and Texas Central Railway Company.

WHEREAS, the Houston and Texas Central Railway Company has become the owner, by purchase, of the Washington County Railroad; and,

WHEREAS, The Houston and Texas Central Railway Company and the Washington County

Railroad Company are indebted to the State of Texas for sums borrowed from the Special School Fund; and,

WHEREAS, The Houston and Texas Central Railway Company is desirous to extend the Washington County branch to the City of Austin as soon as it can be done, and to build its main trunk to Red River in the shortest time possible, and also to build a branch road from some point in Navarro County so as to strike Red River at such point as will enable said company to form a connection with any railroad that may be built southward from Kansas or Missouri to said river; and,

WHEREAS, The ability of said company to build said main trunk and branch roads would be greatly increased by the consent of the State to exchange the six per cent. bonds of the said companies, now held by the State, for the seven per cent. gold interest-bearing bonds of the said Houston and Texas Central Railway Company, issued by virtue of a deed of trust executed by said company on the first day of July, A. D. 1866, in which deed of trust Shepherd Knapp and David S. Dodge, of the City of New York, are named (and have accepted) as trustees; and,

WHEREAS, It is believed that such exchange can be made without in any manner endangering the security of the school fund; therefore:

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of the said railway; and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the "Washington County Railroad" from the Town of Brenham, in the County of Washington, to the City of Austin, in the County of Travis, by the most eligible route to be selected by the engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro County and striking Red River at such point as will enable said railway company to make a connection with any railroad which may be built to said river from the northward; and

the said Houston and Texas Central Railway Company, by reason of the construction of said railway from the Town of Brenham to the City of Austin, and by reason of the construction of said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter be, secured to any railroad company in the State of Texas, by any general law of the State, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon said Houston and Texas Central Railway Company by its charter and by other laws of the State.

SEC. 2. For the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company on the first day of July, A. D. 1870, the Governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued, or to be issued, by virtue of a deed of trust executed by the said company on

the first day of July, A. D. 1866, and mature on the first of July, A. D. 1891, the interest on which is payable on the first days of January and July of each year, in which deed of trust Shepherd Knapp and David S. Dodge, of New York, were named and accepted as trustees; and the Governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company, now held by the State for sums borrowed from the school fund; and the settlement and exchange of bonds herein provided for shall be made at any time that may be agreed upon by the Governor and the said railway company between the passage of this act and the first day of December, A. D. 1870; and in making the settlement herein provided for, the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865 by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies, the said sums

amounting in the aggregate to one hundred and fifty-two thousand eight hundred and sixty-four dollars and fifty cents; provided, that the said Houston and Texas Central Railway Company shall never issue an amount of the seven per cent. bonds above described to exceed twenty thousand dollars to the mile of completed road, including such bonds as have been already issued; nor shall said company ever issue any other bond that shall rank as a first mortgage bond on its road, without first paying the whole amount of the indebtedness of the company to the State.

SEC. 3. The said Houston and Texas Central Railway Company is hereby authorized—any former laws to the contrary notwithstanding—to build its road through the Counties of Limestone and Navarro, on the most eligible route to be designated by its engineers; provided, that the main trunk of said railway shall pass through the County of Dallas, and to a point on Red River within fifteen miles of Preston, as is now required by law, and shall be built as fast as the branch.

SEC. 4. No forfeiture of any of the rights or privileges secured to it by existing laws shall be

enforced against the Houston and Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the Act of the twenty-first of September, A. D. 1866, entitled "An Act granting lands to the Houston and Texas Central Railway Company;" but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been in all respects complied with; provided, that the land-grant to said company shall cease unless the said company shall complete their main trunk east of the Brazos River to Richland Creek, in Navarro County, within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the City of Austin within two years after the passage of this act.

SEC. 5. The branch road from Navarro County to Red River, provided for in the first section of this act, shall be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the said Houston and Texas

Central Railway Company in like manner as every other part of the said railway.

SEC. 6. All laws and parts of laws now in force concerning the Houston and Texas Central Railway Company, or the Washington County Railroad Company, not in conflict with the foregoing provisions, shall not be affected by the passage of this act; and the State shall have the right to interfere, by such legislation as may be thought necessary, to prevent neglect on the part of the said Houston and Texas Central Railway, so that the same may always remain an adequate security to the State for the amount that may be due by the company.

SEC. 7. This act shall take effect from and after its passage.

The above act is published as Chapter CXLVIII., Special Laws, passed at the extra session of the Twelfth Legislature of Texas, pages 325-328, and the doubt sought to be cast upon its enactment by the Secretary of State in publishing the laws of that session was removed by the Supreme Court of Texas in *Houston and Texas Central Ry. Co. vs. Odum*, 53 Tex., 343.

Joint Resolution Proposing an Amendment to Section 6 of Article 10 of the Constitution of the State of Texas.

Be it resolved by the Legislature of the State of Texas that Section 6 of Article 10 of the Constitution of the State of Texas be so amended as hereafter to read and be as follows:

“ SECTION 6. The Legislature shall not “ hereafter grant lands, except for purposes “ of internal improvement, to any person or “ persons, nor shall any certificate for land “ be sold at the Land Office except to actual “ settlers upon the same, and in lots not “ exceeding one hundred and sixty acres; “ *provided*, that the Legislature shall not “ grant out of the public domain more than “ twenty sections of land for each mile of “ completed work in aid of the construction “ of which land may be granted; and *pro-* “ *vided, further*, that nothing in the fore- “ going proviso shall affect any rights “ granted or secured by laws passed prior “ to the final adoption of this amendment.”

Passed May 17, 1871.

(The above resolution is published as Chapter XXVI., page 160, of the joint resolution passed at the first session of the Twelfth Legislature of Texas.)

**Joint Resolution Ratifying an Amendment
to Section Six of Article Ten of the Con-
stitution of the State of Texas, Proposed
by Joint Resolution of the Legislature
of the State of Texas, Passed May 17,
1871.**

WHEREAS, The Legislature of the State of Texas, on the 17th day of May, 1871, passed by a two-thirds vote a joint resolution proposing an amendment to Section Six of Article Ten of the Constitution of the State of Texas; and,

WHEREAS, Said proposed amendment was submitted to the consideration and vote of the people at the last general election held in this State on the 5th, 6th, 7th and 8th days of November, A. D. 1872; and,

WHEREAS, It appears that a majority of those voting upon said proposed amendment voted in favor of said amendment; therefore,

Be it resolved, by the Legislature of the State of Texas, that the said amendment to Section Six of Article Ten of the Constitution of the State of Texas, which is as follows: "SEC. 6. The "Legislature of the State of Texas shall not here

" after grant lands except for purposes of internal improvement to any person or persons, nor shall any certificate for land be sold at the Land Office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres ; *provided*, that the Legislature shall not grant out of the public domain more than twenty sections of land for each mile of completed work, in aid of the construction of which land may be granted; *and, provided further*, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment;" be, and the same is hereby, ratified as an amendment to the Constitution of the State of Texas.

SEC. 2. That this resolution take effect and be in force from and after its passage.

Passed March 19, 1873.

(The above is published as Joint Resolution No. 7, pages 224, 225, General Laws, passed by Thirteenth Legislature of Texas.)

Section 6, Article X., of the Constitution, adopted in 1869-70, reads as follows :

"SECTION 6. The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the Land

Office, except to actual settlers upon the same, in lots not exceeding one hundred and sixty acres."

An Act to Encourage the Construction of Railroads in Texas by Donations of Land.

SECTION 1. Be it enacted by the Legislature of the State of Texas, that any railroad company heretofore chartered, or which may be hereafter organized under the general laws of this State, shall, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there is hereby granted to every such railroad, from the State, sixteen sections of land for every mile of its road so completed and put in good running order; *provided*, that no company whose road is of less than three feet gauge shall be entitled to receive any grant of lands under this section; *provided, however*, that companies constructing railroads on the prismoidal plan shall be entitled to eight sections of land to the mile on the same terms as other roads; *provided, further*, that this act shall not be construed to renew or continue any right to companies who

have failed or may fail to comply with the terms of their charters, with reference to the completion of portions of their roads in stated times; *provided, further,* that the provisions of this act shall not be so construed as to grant the aid herein provided for to any railroad that has already received or is otherwise entitled to receive aid from the State to the amount of sixteen sections of land to the mile.

SEC. 2. Any railroad company having completed and put in good running order a section of ten miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State Engineer, to examine said section of road, and if, upon the report of said engineer under oath, it shall appear that said road is substantially built and fully equipped for the transportation of both passengers and freight, and that the same is operated by steam, and is constructed of iron rails of not less than thirty pounds to the lineal yard (*provided,* that rails for prismatical roads shall not weigh less than twenty-two pounds to the lineal yard), and has been constructed in accordance with the provisions of its charter, or of the general laws

under which it may be constructed, and of the general laws in force regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company certificates of six hundred and forty acres of land each, equal to sixteen sections to the mile of road so completed; whereupon said company may apply to the district surveyor of any land district in this State to survey such lands out of any of the unappropriated public land in his district. Said surveys shall be made in alternate sections, or half sections, as nearly square as practicable, one section for the company and one for the State, for the benefit of the public school fund. A map of all such surveys shall be returned with the field notes to the General Land Office, when the Commissioner of the General Land Office shall number contiguous surveys with even and odd numbers, and shall issue to the company patents for the odd sections of said surveys.

SEC. 3. All lands acquired by railroad companies under this act shall be alienated by said companies—one-half in six years and one-half in twelve years from the issuance of patents to the same; and all lands so acquired by railroad

companies, and not alienated as herein required, shall be forfeited to the State and become a part of the public domain, liable to location and survey as other unappropriated lands; *provided, further,* that the State shall retain the right to regulate the rates of freight and passengers' fare by general law on all roads accepting a grant of land under this act.

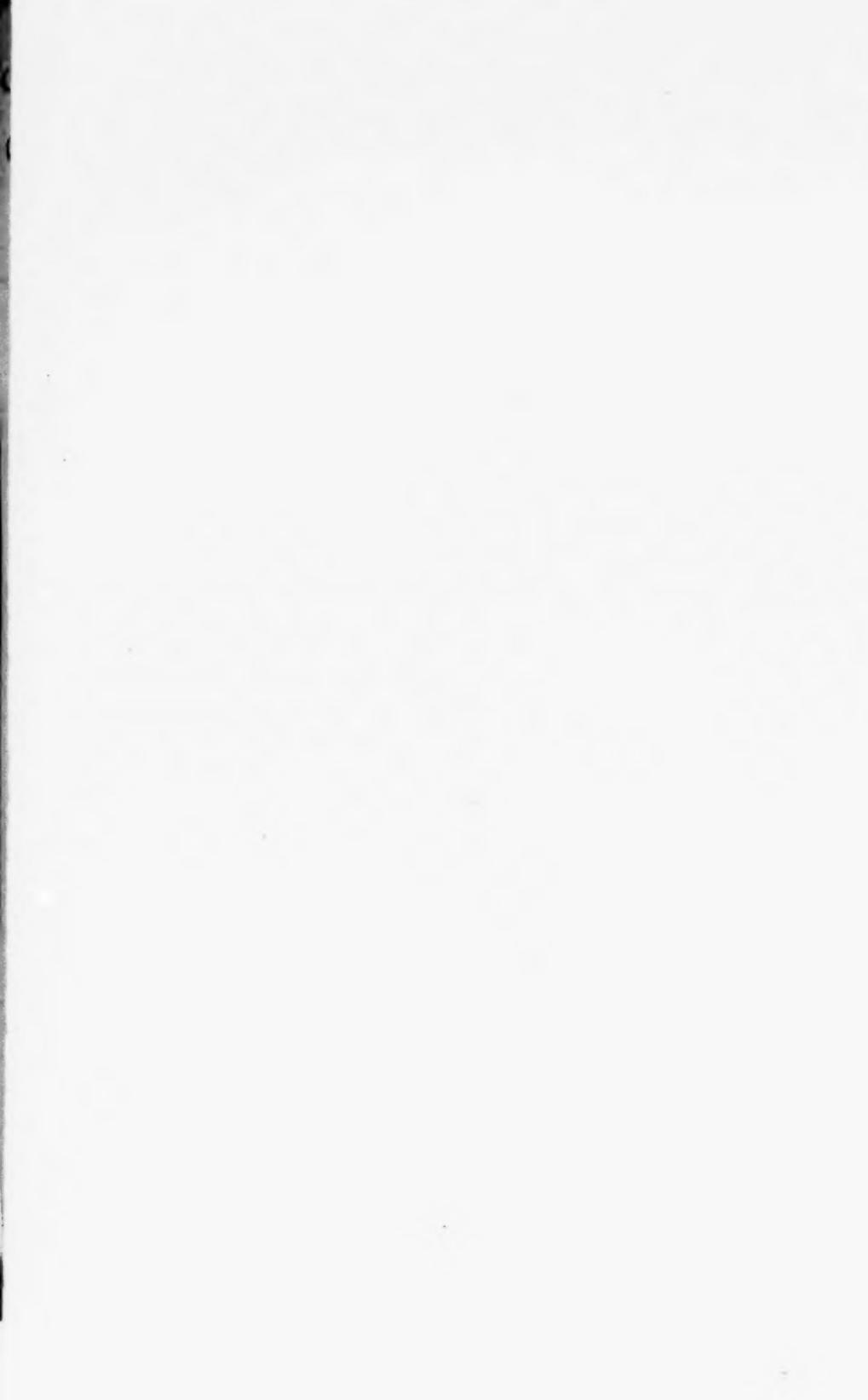
SEC. 4. That, there being no law authorizing State aid in construction of railroads now in force, an imperative public necessity and an emergency exist for the immediate passage of this act, and it is hereby declared that this act take effect and be in force from and after its passage.

Approved August 16, 1876.

Takes effect ninety days after adjournment.

(The above act is published as Chapter CI., pages 153, 154, General Laws, passed by the Fifteenth Legislature of Texas.)

[15,994A]



No. 406.

FILED.

JAN 27 1898

JAMES H. MCKENNEY,

CLERK.

Reply Br. of Blair, Baker & Lovett
for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 27, 1898.

No. 406.

THE HOUSTON AND TEXAS CENTRAL RAILWAY
COMPANY, FREDERIC P. OLcott, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

Reply of Plaintiffs in Error to Supplemental Brief
of Defendants in Error.

J. P. BLAIR,

JAS. A. BAKER,

R. S. LOVETT,

Of Counsel for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

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THE HOUSTON AND TEXAS CENTRAL RAILWAY
COMPANY, FREDERIC P. OLcott, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

Reply of Plaintiffs in Error to Supplemental Brief of Defendants in Error.

Since the conclusion of the oral argument of this cause counsel for defendant in error, by leave of court, has filed a supplemental brief purporting to be a reply to the brief filed in behalf of plaintiffs in error some ten days before the case was called. With leave of the court, we submit the following hastily prepared reply.

I.

We understand counsel for defendant in error first to contend that the Houston and Texas Central Railway Company was not entitled to the grant of sixteen sections of land per

mile made by the act of January 30, 1854, for its *branch line to Austin*, because that act provided that railway companies theretofore entitled to a grant of eight sections per mile, as this company was, should not receive the grant of sixteen sections per mile made by that act for any branch road. This is a proposition which we have never controverted. In our original brief (page 64) we conceded that this company could not claim by virtue of the general act of January 30, 1854, *alone and unaided by subsequent legislation*, the grant made by that act for anything except its main line. What we claim under the general act of 1854, standing alone, is that it granted sixteen sections per mile for the *main line*, extending from Buffalo bayou, at Houston, to the Red river, on the northern border of the State, and this right has not been disputed by the State. We do not claim a grant for the Austin branch by virtue of that act alone, because, as pointed out in our original brief, section 12 of the general act of January 30, 1854 (Appendix to Brief, page XXVIII), expressly provided that any company theretofore entitled to a grant of eight sections per mile should not be entitled to the grant made by that act for any *branch road*.

But we have contended that the special act of January 23, 1856 (Appendix to Original Brief, pages XXXI-XXXV) removed the restriction contained in section 12 of the general act of 1854 with respect to branch lines, so far as this company is concerned, and extended the benefit of the general act to this company for its Austin branch. Our reasons for this contention are set forth in our original brief (pages 64-70) and we refer to the argument there presented without repetition here.

But, as pointed out in our original brief (pages 70-74), we are by no means dependent either upon the general act of January 30, 1854, or the special act of January 23, 1856, for the grant to the Austin line, because whatever doubt existed with respect to our right thereto under those acts was un-

questionably removed by the special act of September 21, 1866 (Appendix, Original Brief, pages LVIII-LXI). Even leaving out of view the general act of January 30, 1854, and the special act of January 23, 1856, expressly extending, as we claim, the benefits of that act to this company for the Austin branch, still, as we shall presently show, we have an unmistakable right to the grant for the Austin branch under the act of September 21, 1866.

II.

It is next insisted by counsel for defendant in error that the State reserved the right to repeal the land grants made in 1854. In support of this contention he refers to section 6 of the special act of January 23, 1856 (Original Brief, Appendix, page XXXV), which reads as follows:

"That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land,' *provided* that the rights to lands acquired before such repeal or modification shall in all cases be protected."

It is to be observed that the right here reserved was merely to repeal the *general act of January 30, 1854*. He also relies upon the last clause of section 2 of the special act of February 4, 1858 (Original Brief, Appendix, p. L), which reads as follows:

"*Provided*, That the benefits of the provisions of any *general* law shall only inure to the said railroad company whilst said laws shall remain in force."

The first reservation of the right thus made to repeal (section 6 of the act of January 23, 1856) was expressly limited to the general act of January 30, 1854. The second and only remaining reservation was the provision in section 2 of the act of February 4, 1858, to the effect that the grant

made by any *general* law should continue only so long as the general law remained in force. Thus it is apparent that the right reserved by the State to repeal extended only to the general law of 1854. The provisions above quoted leave no doubt about this. It is scarcely worth while, however, to discuss at length this question, since we are not at all dependent upon the act of 1854 or any other general law for the grant in question, as we have it, beyond any sort of controversy, by the special act of September 21, 1866.

So let us concede now for the sake of argument that we are mistaken in our contention that the act of January 23, 1856, extended to the Austin line of this company the grant made by the general act of January 30, 1854, and concede further, for the same purpose, that if such grant was made it was nevertheless subject to the right of the State to repeal the laws making the grant; and then, proceeding upon the assumption that we are therefore without any right under the legislation of 1854 or 1856, let us now examine the rights of the company under the act of September 21, 1866. Section I of that act (Original Brief, Appendix, pages LVIII-LX), so far as material to the present inquiry, is as follows:

“That the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land of six hundred and forty acres each for *every mile of road it has constructed, or may construct and put in running order in accordance with the provisions of the charter of said railroad company,*” etc.

Here we have in the broadest terms a grant for *every mile* of the road which the company *has* constructed or *may* construct, without any restrictions or limitations whatsoever with respect to the lines to be thus aided and encouraged, but expressly applying to *all* the lines which the company might construct *in accordance with the provisions of the charter of the company.* It would be difficult to suggest

language more appropriate in legislative enactments to express the intention of the legislature to thus aid and encourage all the lines which this company was authorized to construct, including the Austin branch as well as the main line. The grant applied unmistakably to *all* lines which the company should construct *in accordance with the provisions of its charter*. The lines specified in the company's charter included by express designation the branch line to the city of Austin, as provided in the special act of February 7, 1853, amending and supplementing the charter of the company (Original Brief, Appendix, pages XVIII, XIX). The right to construct the Austin line was thus specifically conferred upon the company by the special act of February 7, 1853, although by section 2 of the original act of incorporation (Appendix, pages 1, 2) the company had general branching privileges. It was required to yield these general branching privileges by section 5 of the act of January 23, 1856 (Original Brief, Appendix, pages XXXIX-XXXV), except such as were "expressly granted by the provisions of its charter to *certain points*." Therefore Austin was the only "*certain point*" designated with reference to branch lines, and that designation was made by the act of February 7, 1853, and was expressly excepted in the relinquishment of the right to construct branches required by section 5 of the act of January 23, 1856. So it appears, we submit, beyond reasonable controversy that the Austin branch was one of the lines covered by the company's charter when the act of September 21, 1866, was passed, and that it was undoubtedly the purpose of that act to make the grant for *all* lines which the company was authorized to construct, and therefore extended to the Austin line. This is a proposition so plain from the terms of the act that it does not seem to admit of extended discussion.

It is said, however, by counsel for defendant in error, in his supplemental brief, that the act of February 7, 1853,

designating the Austin line, was never accepted by the company. We are entirely at a loss to understand where he gets the authority for that statement. That the Austin line was constructed and is in operation today is a fact that admits of no question. It was, we submit, as effectually accepted as any other act relating to this company. Counsel in his supplemental bill says that the company did accept the act of January 23, 1856, which, among other things, contains the provision reserving the right to repeal the act of January 30, 1854. Now, there is no more evidence of the acceptance of that act than of the acceptance of the act of February 7, 1853. It seems, therefore, that the act containing a provision which he conceives to be beneficial to his side of the case he assumes and states was accepted, while another act, benefiting our side of the case, he assumes and says was not accepted. All of these acts, as will be seen by reference to their titles as well as to the subject-matter, were in the form of amendments to the charter of the company and related to the particular lines of road which the company actually constructed and which are in operation today, and never until the filing of the supplemental brief today has it been contended or even suggested that any of them were not accepted and acted upon by the company. They were amendments to the charter and as much a part thereof as if originally incorporated therein.

So we submit that even if it be true that the State had the right to repeal the grant made by the laws of 1854 and 1856, by virtue of the right reserved in the acts of January, 1856, and February, 1858, yet unquestionably the lands now claimed were granted by the act of September 21, 1866, which contained no provision reserving to the State the right to repeal the same. The lines which this company were authorized to construct were greatly needed. The main line from tide water on Buffalo bayou, in the southern part of the State, to the Red river, on the northern border,

penetrating the heart of the State, was much to be desired. The Austin branch, reaching the capital of the State, then wholly without any line of railway, was a great necessity. It is evident that the act of September 21, 1866, was intended to secure the construction of these lines by making certain the grant of 16 sections per mile to this company. Probably there was then some doubt respecting the right of the company under the prior act for the grant to the Austin line. Then, too, the right to repeal that law had been reserved, as we have seen above. In these circumstances the legislature, in order to remove all doubt respecting the right of this company to the land grant and to insure the construction of these lines, passed the special act of September 21, 1866, which expressly conferred upon it the grant of sixteen sections per mile for each line it should construct *in accordance with its charter*, whatever might be the fate of the general land-grant act or whatever might be the policy of the State in future with respect to other companies. This act, omitting as it did all provisions reserving the right to repeal, removed the danger to which the company was then subject from a possible repeal of the general laws in exercise of the right reserved in the acts of 1856 and 1858. This, no doubt, was one of the controlling objects for passing this law. Then, again, it put at rest all doubt as to the right of the company for lands for the construction of its Austin line—a right which might have been disputed, but, as we think, with but little reason—under the act of January 24, 1856. It also removed the danger of the expiration of the existing laws by their own terms in 1868, thereby cutting off the right to earn the lands unless the company should complete its lines before 1868, which was impossible on account of the condition of the State as a result of the war. That these were the objects of the special act of September 21, 1866, seems to be too plain for extended discussion.

III.

In our original brief (page 71) we said that it had never been denied by the State or any of its officers that the special act of September 21, 1866, granted lands for the construction of the Austin line, as well as the main line of the company. The most that was ever claimed by the State with respect to that act was that the road was not constructed as expeditiously as that act required, and the district judge trying this case so held. This holding, however, was not sustained by the court of civil appeals or by the State supreme court, for the very obvious reason that the *fact* of construction had been determined by the executive department of the State, which was entrusted by law with exclusive jurisdiction to ascertain and determine such fact. Counsel for defendant in error in his supplemental brief, as well as in his oral argument, for the first time in behalf of the State denied that the act of September 21, 1866, granted lands for the construction of the Austin line. His contention now is, as we understand it, that the act granted lands only for the main line. This contention is based upon the last clause of section 3 (Original Brief, Appendix, pages LX, LXI), which is in these words:

"And said railroad company shall construct their road in the line heretofore prescribed by 'An act for the relief of the Houston and Texas Central Railway Company,' approved February 8, 1861."

Turning to the act of February 8, 1861 (Original Brief, Appendix page LI), we find the line there defined to be as follows:

"Provided said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro county, and thence to the town of Dallas, or within one and a half miles of said town, and thence to the terminus of Red river, within fifteen miles of Preston."

From this it is argued that the line to be benefited by the grant made by the act of September 21, 1866, was the line thus defined and that line only. This contention scarcely deserves serious consideration. If such was the object of the act of September 21, 1866, then that act was altogether useless and the legislature did an idle thing in passing it. *This company already had a grant of sixteen sections per mile for the line thus referred to, viz., its main line.* As already stated, the grant made by the general act of January 30, 1854, extended to this company, beyond any sort of controversy, for its main line, unaided by any other legislation, but did not extend to the branch line unless so extended by subsequent laws. It has never been denied by the State that the company was entitled to the grant for its *main line* under the general act of 1854, and as a matter of fact it received sixteen sections per mile for each mile of its main line, and they are not in dispute. Having this right, then, under the act of 1854, beyond dispute or room for controversy, what could have been the necessity or reason for passing a special act in 1866 to give it a right which it already enjoyed?

The object of the requirement in section 3 of the act of September 21, 1866, that the company should follow the line defined by the act of February 8, 1861, was to compel the company to construct its line to Dresden and through or near the then growing city of Dallas, and to the vicinity of Preston, on the Red river, rather than at Coffee Station, as provided in section 2 of the original act of incorporation. It simply defined and fixed the route of the *main line*, which otherwise might be uncertain, and prevented the company from varying its line as it saw proper. The legislature intended that the line should go via Dresden, in Navarro county, and via the town of Dallas. There was no occasion to deal further in that act with the route of the Austin branch. That line was already provided for by the act of February 7, 1853, and the only object sought with regard thereto was the construction of the line to the capital of the State. All

the provisions of the act of September 21, 1866, go to show unmistakably that it was a special and independent grant to this company for its Austin branch as well as its main line, and was intended to remove all doubt respecting the right under existing laws and secure the construction of these lines independently of general laws or a change of general policy.

IV.

It is further contended that the Austin branch was constructed under the authority of the act of August 15, 1870, though it is admitted by counsel for defendant in error (Supplemental Brief, page 3) "that it is wholly immaterial whether the road in question was constructed by authority of the act of 1853 or of 1870." The State supreme court in its opinion refusing a writ of error did say, in effect, that the line was constructed under the act of 1870, but did not deny that the right existed under prior laws. There is nothing in the record to justify any such conclusion. The acts speak for themselves, and in our original brief we show that this company acquired the right to build the Austin line as early as February 7, 1853 (Appendix, Original Brief, pages XVIII, XIX), and retained it throughout as a part of its charter rights and obligations, and there is certainly nothing in the record to show that the line was not built under the power thus existing (Original Brief, pages 66, 67). This view of the State supreme court is one of the errors to our prejudice, since thereby it was in effect held that we had no contract to be impaired. The views of the State supreme court upon this question are not at all binding on this court (Original Brief, pages 58-61), and indeed have no place in the record in this cause, as we have shown in our Original Brief, pages 48-57.

V.

Defendant in error's supplemental brief seems to regard and treat our claim as resting in some way on a grant or supposed grant of lands in the charter of the Washington County Railroad Company. Such is not the case. We do not claim this grant by authority of the charter of that company. Neither do we claim nor have we ever received any lands for the 25 miles of our Austin branch, which was constructed by and purchased from the Washington County Railroad Company. By permitting us to purchase that line and make it a part of our Austin branch the State saved the land, aggregating over two hundred and fifty thousand acres, which this company would have earned by constructing the whole of its Austin branch, paralleling the Washington County road for its length, covering a distance of 25 miles of the route. What we do claim is that we purchased, with the consent of the State, the Washington County road, extending from a junction with our main line at Hempstead, in the direction of Austin, for 25 miles to Brenham, and that by then extending it from Brenham to Austin, a distance of over 95 miles, thereby completing the entire Austin branch, we earned the land in controversy, for which certificates were issued to us and which were located upon these lands against that part of the line from Brenham to Austin.

VI.

Counsel for defendant in error in his supplemental brief (pages 10, 11) says that we insist that the ordinance of 1868, passed by the constitutional convention, ratifying the purchase of the Washington County road, was validated by the legislature by the act of August 15, 1870. We certainly hope that it is unnecessary for us to deny that we ever took

any such position. How counsel could have gotten the impression that we contended, as he says we did, that the legislature could itself amend the constitution, we are unable to imagine. What we claimed was, and what we now claim is, that even if the ordinance was void, and therefore ineffectual to validate the purchase of the Washington County railroad, yet the legislature by the act of 1870 did validate such *purchase*, and thereby removed all question in regard thereto. Upon this point we beg to refer, without repetition, to the argument in our Original Brief, pages 139-162.

VII.

Recurring again to the special act of September 21, 1866, counsel for defendant in error in his supplemental brief (pages 9, 10) confesses that there has just occurred to him a view of that act not before suggested. This new view seems to depend in some way upon the general act of November 13, 1866, which he reads in connection with the special act of September 21, 1866. It seems to be sufficient to say that the special act is complete of itself, is entirely clear in its meaning, and does not require the aid of any other act in its construction. He points out that the general act of November 13, 1866 (which this court held in *Davis vs. Grey*, 16 Wall., 203, continued in force for ten years from its date, the general act of January 30, 1854), departed from the general act of 1854 in this respect. The act of 1854 excluded branch lines from the aid thus given to railroads, while the general act of November 13, 1866, in the last clause of section 4 (Original Brief, Appendix, page LXII) provided "that all tap roads over 25 miles long shall be entitled to the benefits of this act." We confess that we are unable to gather from defendant's argument upon this point what benefit he expects to derive from this provision in the general act of November 13,

1866. If it is material at all, we submit that it indicates clearly the purpose of the legislature to grant lands for the construction of branch roads—thereby reversing the policy followed in enacting the general act of 1854. This certainly favors our contention (which, however, does not seem to need such support) that the special act of September 21, 1866, was intended to grant land for the Austin branch as well as for the main line.

VIII.

It is also contended by counsel for defendant in error that this company is not entitled to the lands in question, because it is claimed the certificates were located in what was then known as the Texas and Pacific reservation. Such claim was stated as one of the grounds of recovery in the original petition in the district court, but apparently was not urged. The district judge who tried the case declined to pass upon that question (Record, page 33). The court of civil appeals likewise found it unnecessary to determine the question (Record, page 96, 97). Neither was it considered by the State supreme court in the opinion refusing the writ of error (Record, page 185-187). We submit, therefore, that the question is not in the case. Moreover, it does not go to the right of the company to the land grant in question, nor to the validity of the certificates, but only concerns the *location* of the particular sixteen certificates directly involved in this suit. The decisions of the district judge and the opinion of the court of civil appeals, as well as of the supreme court, however, each and all deny the validity of the *certificates themselves*, and have the effect to invalidate the title of the company to the entire grant of over nine hundred and eighty thousand acres of land for the construction of that part of the Austin branch extending from Brenham to Austin,

when it is not claimed that all of the certificates, or, indeed, that any except these sixteen, were located in the Texas and Pacific reservation. We take it that this court will consider the grounds upon which the case was decided by the courts below and the issues as presented by the pleadings, so far as they present rights within the protection of the National Constitution, and will not inquire into issues not involving Federal questions when they were not passed upon by the State courts. The proposition that this point was not the basis for the judgment of the State courts is not a mere matter of inference or deduction, but appears expressly from the language of the courts themselves. We submit, therefore, that the question is wholly irrelevant.

We need not, however, rest the question here. The act reserving the land for the Texas and Pacific was not passed until May 2, 1873, while it is undisputed in the record that *this company's certificates were located July 28, 1872* (Record, pages 65, 66). There can be no question, therefore, respecting the validity of the location as against the Texas and Pacific reservation. Upon this point see the fifth ground of the petition to the State supreme court for writ of error, as contained in the printed Record, page, 147, where the statutes and the Texas decisions bearing upon the point are cited.

The special act of the legislature of Texas making the reservation in favor of the Texas and Pacific Railway Company is not in the record. Counsel for defendant in error did not copy it in his brief, as required by the rules of this court, nor has he in any way brought the act before the court, or enabled this court to inspect the act so as to determine what, if any, reservation was made, when it was made, and the conditions upon which it was made. We insist, therefore, that the question sought to be presented with respect to this matter by counsel for defendant in error should be dismissed from consideration altogether.

IX.

We have endeavored to limit this argument to a reply, strictly, to the supplemental brief and argument of defendant in error, but in conclusion beg leave to call the attention of the court to the case of *Davis vs. Grey*, 16 Wall., 203 (so often cited in our original brief as controlling in this case), in connection with a point mentioned in the oral argument, but to which we failed to refer in our original brief. It is this: In that case this court recognized and gave effect to an act passed July 27, 1870, while the constitution of 1869 was in force, as an affirmation by the State of the right of the Memphis, El Paso and Pacific Railroad Company to the lands granted it under laws prior to 1869 (16 Wall., 223, 232). This is a direct authority to the effect that the act of August 15, 1870 (Original Brief, Appendix, pages LXVIII-LXXV), was effectual, notwithstanding the constitution of 1869, to waive any ground of forfeiture that might have then existed for default with respect to construction, and to ratify the purchase of the Washington County railroad, even though the ordinances of the convention which framed the constitution of 1869 should be held void. Such authority scarcely seems to be necessary, but nevertheless it exists in the case referred to.

Respectfully submitted.

J. P. BLAIR,

JAS. A. BAKER,

R. L. LOVETT,

Of Counsel for Plaintiffs in Error.

No. 406.

FILED,
JAN 17 1898
JAMES H. MCKENNEY
Clerk

Brief of Crane for D. C.

Filed Jan. 17, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 406.

THE HOUSE & TEXAS CENTRAL RAILROAD COMPANY, DEFERICK P. OLcott, ET AL., PLAINTIFFS IN ERROR.

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

M. M. CRANE, ATT'Y.-GEN'L.

Counsel for the State of Texas, Defendant in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

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THE HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, FREDERICK P. OLCOTT, ET AL., PLAINTIFFS IN ERROR.

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

I have seen no copy of the brief of plaintiffs in error. I therefore cannot determine whether the statement of the case made by them is correct or not. In lieu thereof, therefore, I submit the statement made by the District Judge who tried the case in the court below, with this prefatory addition—that the case was tried in April, 1893, on the trial of which the District Judge made the following statement which I adopt as my own:

"This is a suit by the State, through its Attorney General, J. S. Hogg, against the Houston & Texas Central Railway Company, Fred. P. Olcott, and George E. Downs, to recover sixteen sections of land, each containing six hundred and forty acres, situated in Nolan County; suit filed February 3, 1890. George E. Downs files a disclaimer.

"The court finds the following facts, viz:

"1. That a special act was passed by the legislature of the State of Texas, approved March 11, 1848, incorporating the Galveston & Red River Railway Company. By said act said company was authorized to construct a railroad from a point on Galveston Bay or its contiguous waters to a point on Red River, with the privilege of constructing and maintaining branches. There was no land grant coupled with this act of incorporation.

"2. That a special act was passed by the legislature, approved February 14th, 1852, supplementary to the above act, in which it was provided that eight sections of land of 640 acres each should be granted to said company for every mile of railroad actually completed and ready for use.

"3. That a special act was passed by the legislature, approved January 23rd, 1856, supplementary to the several acts incorporating said company, in which it was provided that if said company completed its first twenty-five miles of road, commencing at the city of Houston, within six months after January 30th, 1856, its failure to complete any portion of its said road before said date should not operate as a forfeiture of any of its rights, and that said company would then be entitled to its rights, benefits, and privileges granted by an act approved January 30th, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of lands,' and it was further provided in said special act 'that nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854.' By this special act also the said company was authorized to issue bonds and to mortgage all of its property.

"4. That by virtue of a special act of the legislature approved September 1st, 1856, the name of the company was changed to the 'Houston & Texas Central Railway Company.'

"5. That a special act was passed by the legislature and approved February 4th, 1858, providing that the failure of the Houston & Texas Central Railway Company to complete the third section of twenty-five miles of its road by the 30th of July, 1858, should not work a discontinuance of the benefits conferred by any general laws of the State of Texas in reference to railroads, provided the third section should be completed by

July 30th, 1859. This act contains a proviso 'that the benefits of the provisions of any general law shall only accrue to the said railroad company whilst said law shall remain in force.'

"6. That on the 25th day of November, 1862, the said railway company, by its board of directors, passed a resolution by which the original *bona fide* stockholders of said company would be restored to their rights in said company upon the payment into the treasury of said company of 10% upon their said stock in accordance with the provisions of the acts of the 11th day of January, 1862; that under and by virtue of said resolution, said stockholders were accorded all rights contemplated by said law, and many stockholders took advantage thereof. A copy of said resolution was never forwarded to the governor of Texas.

"7. That a special act was passed by the legislature and approved September 21st, 1866, which provided, among other things, that the said Houston & Texas Central Railway Company shall construct and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1st, 1867, or fifty miles within two years from that date, and such grant of land (sixteen sections to the mile granted in the act) shall be discontinued when said company shall fail to construct and complete at least twenty-five miles of the road contemplated by their charter each year after the construction of said first mentioned fifty miles of road, provided that said road shall be put in running order to Bryan station and cars running regularly thereon by the 1st day of September, 1867. This and the other special acts granting lands to said railway company provided the manner of procedure by which it could procure certificates for the land due to it.

"8. That a special act of the legislature of date August, 1870, provides that 'no forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company by reason of its failure to comply with the conditions as to construction imposed by the first section of the act of the 21st of September, 1866, entitled "An act granting lands to the Houston & Texas Central Railway Company," but the said company shall have and enjoy all of the rights and privileges secured to it by existing laws the same as if the conditions embraced in the first section of said act

of the 21st of September, 1866, had been in all respects complied with, with a proviso which was complied with.

"9. That on the 1st day of January, 1865, the terminus of said railroad was at Millican, in Brazos County.

"10. That the fourth section of twenty-five miles of said railroad terminating at Bryan, was completed August 27, 1867.

"11. That the fifth section of twenty-five miles of said railroad was completed on or before June 15th, 1869.

"12. That the sixth section was completed on or before August 17th, 1870.

"13. That the seventh section was completed on or before July 15th, 1871.

"14. That the eighth section was completed to Richland Creek on the 26th of September, 1871.

"15. That by an act of the legislature approved February 2, 1856, the Washington County Railroad Company was chartered for the purpose of constructing a railway from some point on the track of the Galveston & Red River R. R., crossing the Brazos River within the limits of Washington County, and then running in the most suitable direct line to Brenham, in said county. The said company was organized and constructed its road from Hempstead, in Waller County, to Brenham, in Washington County, a distance of about 25 miles.

"16. That by the act of the legislature passed August 25th, 1870, the Washington County Railroad was merged in and became a part of the Houston & Texas Central Railway. This latter railway was authorized by said act to extend the Washington County Railroad from Brenham to the city of Austin.

"17. That the Houston & Texas Central Railway received from the State of Texas 540 land-scrip certificates for 640 acres each, all of which have been located and surveyed on public domain; that each and all of these certificates, in which are included the ones involved in this suit, were issued for and upon that portion of defendant's line of railroad extending from the city of Brenham to the city of Austin.

"18. That the defendant's main line of track from Brenham to Austin, mentioned in each of said certificates, is $93\frac{3}{4}$ miles, and the sidings and switches at and between the same points is $2\frac{3}{8}$ miles.

"19. That the lands described in plaintiff's petition were located and are now held without patents by the defendants, by virtue of said certificates, according to the number and description set forth in said petition.

"20. The sections of defendant's line of railway from Brenham to Austin were completed, respectively, 1st, on January 20th, 1871; 2nd, on September 15th, 1871; 3rd, on November 26th, 1871, and 4th, completed to Austin on 25th of December, 1871.

"21. That the defendants paid taxes on the land sued for continuously since they were located up to the present time.

"22. That the defendants paid all fees of locating and surveying the lands sued for, as well as for the same number of alternate sections for the public free school fund.

"23. That the various engineers appointed by the different governors to inspect railroads, as the same were constructed, in their respective reports of inspection, stated the number of miles and feet of main track, the number of miles or feet of sidings. The action of the respective governors, except Governor Roberts, on said report, was usually in the following words: 'Report examined and approved,' upon which reports and action of the governors the commissioners of the general land office issued to the respective companies certificates for main track and sidings in form such as is shown by the record during the administration of Governor Roberts. He approved for only the number of miles of main track stated in the report. In one instance Governor Davis approved a report of sidings exclusively, for which certificates were issued in usual amount per mile. This was done in one instance also by Governor Hubbard, for which certificates were issued. Governor Hubbard, on one of the reports, endorsed: 'This report of Inspector Gray examined and approved for 30 miles main track and sidings as being made, graded, and in all respects complying with the law.'

"24. That the lands sued for and described in plaintiff's petition are situated in Nolan County, Texas, in what is known as the Pacific reservation, created by special act of the legislature of date May 2, 1873, entitled 'An act to adjust and define the rights of the Texas & Pacific Railway Company within the State

of Texas,' etc., and the same were located and surveyed, fourteen of them on June 1st, 1873, and two of them on June 7th, 1873.

"25. That the sixteen certificates, by virtue of which the land sued for was located, were issued by the Commissioner of the General Land Office on July 1st, 1872, after the road from Brenham to Austin had been completed and put in running order, and after John W. Glenn, civil engineer and commissioner for the State, had reported to the governor of the State that the Houston & Texas Central Railway Company had complied with the provisions of its charter and of the general laws of the State of Texas relating to the construction of railroads.

"26. That since the location of said lands, they have been platted upon the map in use at the general land office of the State of Texas, and recognized by the land commissioners as the Houston & Texas Central Railway Company's lands.

"That on the 26th day of May, 1886, in consolidated cause No. 198 of the equity docket of the Circuit Court of the United States, for the eastern district of Texas, entitled 'Nelson Easton and James Rintoul, trustees, and the Farmers' Loan & Trust Company, trustee, vs. The Houston & Texas Central Railway Company, et al.,' Charles Dillingham, Nelson S. Easton and James Rintoul were duly appointed receivers of all the land franchises, and property of every nature of said railway company.

"That on December 7th, 1888, by an order of said Circuit Court said Easton and Rintoul were relieved from further duty as such receivers, and Charles Dillingham was continued as sole receiver until the property of said railway was turned over to the purchaser thereof.

"That at a sale duly authorized by said Circuit Court, which took place in the city of Galveston on the 8th day of September, 1888, the defendant, F. P. Oleott, became the purchaser of the property of every kind and description of the Houston & Texas Central railway, including the lands in controversy.

"That said receiver, Dillingham, duly executed to said F. P. Oleott a deed to said property, including the land in controversy.

"That the Houston & Texas Central Railway Company, as a

further assurance to the purchaser, intervened and joined in said deed by its duly authorized officer.

"That said sale was duly confirmed by the court on the 8th day of January, 1889.

"That the lands in controversy, as well as all other property of the railway, had been mortgaged by it, and the said sale was ordered for the purpose of paying off the mortgages.

"CONCLUSIONS OF LAW.

"1. That this suit having been brought for the sole purpose of determining the question of title to the lands in controversy between the State of Texas and the defendants, said railway company and Olcott, the same can be maintained for said purpose, notwithstanding the fact that said railway company and lands in controversy are still in the custody of a receiver appointed by the Federal Court, and that this suit is brought without the permission of the Federal Court.

"2. That the sale of the lands in controversy to F. P. Olcott and the deed executed to him were effected to convey him all title and interest in and to said lands then owned by said railway company.

"3. That the resolution passed on November 25th, 1862, by the board of directors of the Houston & Texas Central Railway Company, restoring its stockholders to their rights, etc., was a substantial compliance with the requirements of the act of June 11th, 1862, and a failure to file a copy of said resolution with the governor would not deprive said company of the benefits of said act.

"4. That under and by virtue of the special act approved January 23rd, 1856, the State had the right to repeal the act of January 30th, 1854, granting lands to railroads in so far as the same affected the Houston & Texas Central Railway.

"5. That the special act approved February 4th, 1858, in so far as the same could have been held to grant land to the Houston & Texas Central Railway Company, ceased to be operative at the time the act of January 30th, 1854, granting lands to railroads, expired by limitation.

"7. That the effect of the act approved January 11th, 1862,

extended the operation and life of the act of January 30th, 1854, until two years after the close of the war, which was May 28th, 1865. This last named act therefore expired by limitation on the 28th of May, 1867, unless kept in force by the act approved November 13th, 1866.

"8. That the act approved November 13th, 1866, is in conflict with the Constitution of 1866 and previous Constitutions of the State, and is therefore null and void.

"9. That the Houston & Texas Central Railway can not claim these lands under the special act of September 21st, 1866, granting 16 sections to the mile, for the reason that it failed to comply with the provisions of that act, that it should build fifty miles of road within two years from January 1st, 1867, and seventy-five miles within three years from that date. The company had therefore lost the right to earn land under that act.

"10. That the act of August 15th, 1870, enacted after the adoption of the Constitution of 1869, which repealed the act of September 30th, 1854, was in conflict with that constitution and therefore null and void.

"11. That the defendant F. P. Olcott, having taken title under the certificates, no patents having been issued, is affected with notice of their invalidity under the Constitution of 1869.

"12. The foregoing conclusions rendered it unnecessary to determine whether the special law entitled 'An act to adjust and define the rights of the Texas & Pacific Railway Company in the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific ocean,' approved May 2nd, 1873, is or is not constitutional.

"13. Judgment will be rendered for the plaintiff for the land in controversy and for costs.

"To which defendants except." (Record, pp. 28-33).

From that judgment, plaintiffs in error appealed to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the case was by that court affirmed on May 9th, 1896. (Record, pp. 95-7). The Court of Civil Appeals adopted the statement of the case made by the trial court in so far as the conclusions of facts were involved, and held as a matter of law that the certificates under which plaintiffs in error claim the

land were void, because at the date of their issuance, the State Constitution of 1869 had been adopted, and plainly prohibited them. A motion for a rehearing was made by plaintiffs in error in that court, and overruled. They then sought to remove the case to the Supreme Court of the State by a writ of error, but the application for a writ of error was denied. He has therefore sought this court assigning the following errors:

"First.—The said Court of Civil Appeals erred in overruling and in holding not well taken appellants' first and sixth assignments of error, which complained of the action and ruling of the court below in overruling and denying petitioners' plea to the jurisdiction of said court, based upon the ground, in effect, that all the land sued for was at the time in the custody and possession of the Circuit Court of the United States in and for the Eastern District of Texas, at Galveston, in consolidated cause No. 198, on the equity docket of said court, entitled, 'Nelson E. Easton and James Rintoul trustees, and the Farmers' Loan & Trust Company, trustee, vs. The Houston & Texas Central Railway Company, et al,' through Charles Dillingham, the receiver of said Circuit Court in said cause, and this suit was instituted without permission of said court, and in deciding that notwithstanding such facts the District Court of Nolan County had jurisdiction in this cause.

"Second.—The said Court of Civil Appeals erred in overruling and holding not well taken appellants' second assignment of error, complaining, in effect, of the action and ruling of the court below in overruling and denying and holding not well taken petitioners' plea in abatement, based upon the ground, in effect, that Charles Dillingham, the receiver of the Circuit Court of the United States in and for the Eastern District of Texas, in the cause above mentioned, was a necessary and proper party to this suit, because all the property sued for was in his custody and possession as such receiver.

"Third.—The said Court of Civil Appeals erred in overruling and holding not well taken appellants' seventh, fourteenth, seventeenth and twenty-first assignments of error, and in deciding that the acts of the legislature of the State of Texas, approved March 11th, 1848; February 14th, 1852; February 7th, 1853; January 30th, 1854; January 23rd, 1856; September 1st, 1856; Febru-

ary 8th, 1862; January 11th, 1862; September 21st, 1866; November 13th, 1866; August 15th, 1870, and the declaration of the constitutional convention of the State of Texas passed August 29th, 1868, and the acceptance of said laws and the construction by plaintiff in error, at large expense, of an important part of its lines of railway prior to the adoption of the Constitution of 1869, and the completion of its entire line subsequently in due time, did not constitute a valid contract between the State of Texas and said railway company entitling said railway company and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in holding, in effect, that said contract could be and was impaired, and the right of plaintiffs in error to said land was divested by the Constitution of the State of Texas, adopted in 1869, contrary to and in violation of the Constitution of the United States, and especially article 1, section 10, thereof, and section 1 of article 14 of the amendments thereof.

"Fourth.—The said Court of Civil Appeals erred in not deciding that the acts of the legislature of the State of Texas approved March 11th, 1848; February 14th, 1852; February 7th, 1853; January 30th, 1854; January 23rd, 1856; September 1st, 1856; February 8th, 1862; January 11th, 1862; September 21st, 1866; November 13th, 1866; August 15th, 1870, and the declaration of the constitutional convention of the State of Texas passed August 29th, 1868, and the acceptance of said laws and construction by plaintiff in error railway company, at large expense, of an important part of its lines of railway prior to the adoption of the Constitution of 1869, and the completion of its entire line subsequently in due time, constituted a valid contract between the State of Texas and said railway company entitling said railway company and creating in it a vested right to the lands granted by said laws and earned by said railway company thereunder, including the lands involved in this suit, and in not holding that said contract could not be and was not impaired, and the rights of plaintiffs in error were not divested by the Constitution of the State of Texas adopted in 1869, and that in so far as said State constitution attempted to impair such contract and divest such right, the same was and is contrary to and

in violation of the Constitution of the United States, and especially article 1 of section 10 thereof, and section 1 of article 14 of the amendments thereof, and therefore void.

"Fifth.—The said Court of Civil Appeals erred in affirming the judgment of the District Court of Nolan County, whereby the State of Texas had and recovered the said land from plaintiffs in error, and in not reversing the said judgment."

FIRST COUNTER-PROPOSITION UNDER FIRST AND SECOND ASSIGNMENTS OF ERROR.

The receiver, Dillingham, was not a necessary party to the suit between the State of Texas and the Houston & Texas Central Railroad Company; for the reason that he had sold the land, the sale confirmed, the deeds delivered and recorded, and he could not have been held to have been in possession.

Statement: The receiver, acting under an order of court, had sold the land in controversy. The sale had been confirmed, the deeds delivered and recorded. (Record, p. ——.)

Authorities:

Texas Code of 1895, Arts. 5252-5254.

State vs. W. L. & C. Co., 73 Texas, 453.

H. & T. C. R. R. and Olcott vs. State of Texas, 89 Texas, 300.

Argument: This suit was a statutory action of trespass to try title. The provisions of the Texas Code governing such actions are in the following language:

"Art. 5252. When a party is sued for lands the real owner or warrantor may make himself, or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

"Art. 5253. When such action shall be commenced against a tenant in possession the landlord may enter himself as the defendant or he may be made a party on motion of such tenant, and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

"Art. 5254. The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied."

The Supreme Court of the State in passing on this question, uses the following language:

"The land in controversy was not occupied by any one, and the defendants did not claim to hold it as tenant of the receiver of the Houston & Texas Central Railroad, nor was the receiver bound to them or either of them in the character of warrantor. If he had been either it would not have been necessary for the plaintiff to make him a party defendant to the suit, but he might have been a party at the instance of the defendant or on his own motion.

"When the State instituted this suit it presented to the defendants an issue of title, and if they did not claim title to the land they should have entered their disclaimer; by filing a plea of not guilty they joined issue with the State upon the question of title. The fact that a third person claims title to the land in controversy will not entitle the defendants in the suit to have such third person made party thereto if the defendant does not claim as tenant of such third person." (89 Texas, 300-301.)

SECOND COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

By the order of the court authorizing the sale of the land in controversy, the sale by the receiver, the report thereof, and the confirmation of the sale, the delivery of the deed conveying the land to Olcott, his acceptance thereof as evidenced by the recording of the deed in the several counties in which the land was situated, and the payment of the purchase money received in said deed, all title to the land in question was divested out of the defendant company, and thereby rested in F. P. Olcott. Until the sale or order confirmatory thereof shall be set aside and annulled, the legal title and right of possession must remain in Olcott.

Authorities:

- Koontze vs. Northern Bank, 16 Wall., 200-203.
 Russell vs. Railway, 68 Texas, 653.
 Beach on Receivers, Sec. 516.
 Walker vs. Morris, 14 Ga., 323.

THIRD COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

Under the facts above stated, if the receiver had any kind of possession of the land, his possession must have been that as the agent of Olcott, the purchaser, and not as the arm of the court or receiver, because the receivership, in so far as this land was involved, was at an end.

Authorities:

- Ry. Co. vs. Johnson, 76 Texas, 421.
 Ry. Co. vs. Gay, 86 Texas, 571.
 Hickox vs. Holiday, 29 Fed. Rep., 226.
 Very vs. Watkins, 23 How., 469.
 Beach on Receivers, Sec. 517.

FOURTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

In order to make the receiver a proper defendant with the Houston & Texas Central Railway Company, some right to relief at the receiver's hands should be stated, and some relief prayed as against him.

Authorities:

- High on Receivers, See 259.
 Arnold vs. Suffolk Bank, 27 Barb., 424.

- Tracy vs. Nat'l. Bank of Selma, 37 N. Y., 523.
 Wilson vs. Wilson, 1 Barb. Ch., 592.
 Beach on Receivers, Sec. 708.
 Patrick vs. Eells, 30 Kan., 680.
 N. P. Bank vs. Goddard, 20 N. Y. Sup., 526.

FIFTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

The receiver himself should make application to be joined as defendant with the corporation over which he has been appointed; and the refusal of such an application made by the corporation is not error. The plaintiff is not bound to bring in the receiver.

Authorities:

- Beach on Receivers, latter part of Sec. 708.
 Mercantile Ins. Co. vs. James, 87 Ill., 199.
 Mercantile Trust Co. vs. Pittsburg, 29 Fed. Rep., 732.

SIXTH COUNTER-PROPOSITION UNDER SAID ASSIGNMENTS.

The application to abate the suit came too late, because it was a year after the issue had been joined.

Statement: The facts are as stated above. (Record, p—).

Authorities:

- Elkhart Car Works Co. vs. Ellis, 113 Ind., 215.
 Hubbell vs. Dana, 9 How. Pr. (N. Y.), 424.

SEVENTH COUNTER-PROPOSITION UNDER SAID ASSIGNMENTS.

The equitable rule of comity invoked has no application to the facts of this case. It only applies where the suit is against the receiver, or where his possession is disturbed or sought to be disturbed. This suit was against Olcott and the railroad company, but not against Dillingham, nor did it seek to disturb his possession, if possession he had.

Authorities:

Gluck & Becker, Receivers, See, 35.

EIGHTH COUNTER-PROPOSITION UNDER ABOVE ASSIGNMENTS.

It was not necessary to get leave of the court to sue Olcott and the company, because Olcott and the company were not within the jurisdiction of the court.

Authorities:

Bethel vs. Bank, 14 Wall., 383.
 Pringle vs. Woodworth, 90 N. Y., 502.
 Gluck & Becker, Receivers, 26, 27, 82, 83.
 24 U. S. Stat. at Large, 554.

FIRST COUNTER-PROPOSITION UNDER THIRD ASSIGNMENT OF ERROR.

The Court of Civil Appeals did not err in holding that the acts of the Texas legislature approved March 11th, 1848, February 14th, 1852, February 7th, 1853, January 30th, 1854, January 23d, 1856, September 1st, 1856, February 8th, 1862, January 11th, 1862, September 21st, 1866, November 13th, 1866, and August 15th, 1870, did not constitute a contract between the State and the defendant, authorizing it to build a branch road from Brenham to Austin.

Statement: The act of 1848 chartered a railroad corporation to be known as the "Galveston & Red River Railway Company." (See Special Acts of the Texas Legislature of 1848, p. 370.) By the express terms of the charter no grants of land were made or promised. Section 2 of the charter marks out the line of the road authorized to be constructed. It reads as follows:

"That the said company may be and is hereby invested with the right to make, own and maintain a railway from such point on Galveston Bay, or its contiguous waters, to such point on the Red River between the western boundary line of Texas and Coffee's Station as the said company may deem most suitable, with a privilege of making, owning and maintaining such branches to the railway as they may deem expedient." Special Acts of 1848, 370.

In 1852 the charter was amended, by striking out the fourth and all subsequent sections, and substituting eighteen other sections instead. Section 14 of the act provided for a grant of land. It reads as follows:

"There shall be granted to said company eight sections of land of six hundred and forty acres each, for every mile of railway *actually completed by them and ready for use;* and upon the application of the president of the company, or any duly authorized agent thereof, stating that any section of five miles, or more of said railway *has been completed and is ready for use,* it shall be the duty of the Comptroller of Public Accounts to require the State Engineer, or a commissioner to be appointed by the governor, to examine said railway, and upon his certificate that said section of said railway *has been completed in a good and substantial manner, and is ready for use,* the Comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company, land certificates to the amount of eight sections of land, of six hundred and forty acres each, *for each and every mile of railway thus completed and ready for use;* such certificates shall be for six hundred and forty acres each, and shall be located upon any unappropriated public domain of the State of Texas, within twelve months from the issuing thereof, which date shall appear upon the face of each certificate; and upon the return of the field notes of any survey made by virtue of any certificate thus issued, it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name; one-fourth of which said lands *thus patented* shall be alienated by the company in six

years; one-fourth in eight years, one-fourth in ten years, and the other fourth in twelve years, so that the whole of the lands thus granted shall pass from the hands of the company within twelve years from the date of the patents thus issued." (Special Acts of 1852, pp. 142, 145-6).

It will be noted that Section 14 requires the road to be completed by sections of five miles each, and when completed and ready for use, the land certificates are to be granted for such sections.

In 1854 the legislature of Texas passed a general law to encourage the construction of railways in Texas by donations of land. Section 2 of said act reads as follows:

"That any railroad company having actually put under contract as much as twenty-five miles of its road, or [its entire road when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office, and upon depositing with the Treasurer of the State a bond with two or more good sureties, to be approved by him in favor of the governor of the State, in the sum of ten thousand dollars, conditioned as hereinafter required, may file an application with any district surveyor of any land district in this State, a copy of which application shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor to survey any quantity of the public domain lying and being in such district, and subject to location and entry, not to exceed eight hundred sections, and said application shall specifically describe the lands applied for and intended to be surveyed; and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road; and also a certificate from the Treasurer that a bond as required by this act has been deposited in his office, said application shall exempt the land so designated from any future location, entry or pre-emption privilege, until otherwise directed as hereinafter provided; provided, that no application for a survey of lands under the provisions of this act, shall be made for more than six months before the completion of such section; and if said section be not completed and notice thereof given as herein provided, within six months from the time of the application, then such land applied for shall become subject to location and entry as if no such application had been made."

Section 6 of the act, like the charter of the Galveston & Red River Railroad Company, reads as follows:

"That any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the

same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road, and if upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter, and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands or any part thereof shall not have been surveyed at the time said section is completed, then it shall be the duty of said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed, whereupon said company may apply to the district surveyor of any land district in this State, to survey any quantity of vacant land subject to location and entry in such district, not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered and colored as directed in the third section of this act, and upon the return of the field notes and map or maps of such surveys to the general land office, and the certificates so issued, it shall be the duty of the Commissioner to issue to said company patents for the odd sections of said surveys; provided, that in case the surveys are not applied for before the completion of any section of road, it shall not be necessary to deposit with the Treasurer a bond as required in the second section of this act."

Section 12, so far as applicable, reads as follows:

"That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, *nor to any company for more than a single track road, with the necessary turnouts;* and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, excepting the provisions of this act, *shall not be entitled to receive any grant of land for any branch road;* provided, this act shall not be so construed as to give to any company now entitled by law to receive eight sections of land more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act; and such donations shall be discontinued in every case where the company or companies shall not construct and complete at least twenty-five miles of the road contemplated by their charter, each year after the construction of said first-mentioned twenty-five miles of road. (General Laws of 1854, pp. 11-15.) This act shall continue in force for ten years and no longer."

It will be noted that by the express terms of the Act of 1854, the appellant company, if it claimed anything under that general law, was not entitled to any land for any branch road.

In 1856 the Washington County Railroad was chartered, with authority to build a road from a point on the Galveston & Red River Railway to Brenham, Texas, and it constructed a line of railroad from that point to Brenham. (Special Acts of 1856, pp. 49-53.)

In 1856 an act was passed for the relief of the Galveston & Red River Railroad Company, and supplementary to the several acts incorporating said company. Time was given in which it should complete a section of twenty-five miles of said railroad, it being extended for six months after the 30th of January, 1856. It was further authorized to borrow money. Section 5 of said act reads as follows:

"That said railroad company in accepting the benefits of this act shall yield all general branching privileges except such as are expressly granted by the provisions of its charter to certain points, and shall be required to spend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch," etc.

Section 6 reads as follows:

"That nothing in this act shall be so construed as to effect [affect] the right of the State to repeal or modify the Act of January 30th, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land;' provided, that the right to lands acquired before said repeal or modification, shall in all cases be protected." (Special Acts of 1856, pp. 28-30.)

All of the acts in question, and particularly the original charter, required the certificates to be located on unappropriated public domain. This special act above cited is pleaded by plaintiff, and is in part the act upon which the assignment of error is based.

In 1856 the legislature passed another act in which it authorized the Galveston & Red River Railroad Company to change its name to the Houston & Texas Central Railroad Company. (Special Acts of 1856, p. —.)

Time was extended to the railroad company for the completion of certain sections of its road by special act of February, 1858. Section 27 of said act, extending said time, reads as follows:

"The failure of the Houston & Texas Central Railroad Company to complete the third section of twenty-five miles of its road by the 30th day of

July, 1858, shall not work a discontinuance as to the said company of the benefits of the act entitled 'An act to increase the construction of railroads in Texas by the donation of land,' or any of the general laws in reference to railroads, if said company shall complete said third section by the 30th day of July, 1859. And that on the *completion* of the subsequent sections of twenty-five miles annually after the said 30th day of July, 1859, or fifty miles every two years, said company shall be entitled to 16 sections of land per mile as contemplated in said last mentioned act, for each section so *completed*; and whenever a failure shall occur on the part of the said company to *complete* a section within the time required, then the land applicable to that section only shall be forfeited, and the *completion* of future sections within the time contemplated by law, shall entitle the company to the benefits of said last mentioned act as fully as if no failure has been made in *completing* any former section, except as to the section on which the failure occurred; provided, that the *benefits of the provision in the general law shall only inure to the said company while said laws shall remain in force.*"

In 1866 another act granting the railroad relief and extending the time in which to complete its sections and put them in running order was passed. In so far as applicable, it reads as follows:

"That the Houston & Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in *running order*, 'in accordance with the provisions of the charter of said railroad company;' provided, that the lands heretofore drawn by said company by virtue of an act to encourage the construction of railroads in Texas by donations of lands, approved January 30th, 1854, be deducted from the amount of land granted hereby. And provided further, that the land certificates heretofore issued to this company, on the three first sections of their road, by virtue of the act aforesaid, be included in the terms, benefits and conditions of this act, as if issued by virtue of its provisions; and further provided, that said company shall construct and put in *running order* a section of twenty-five miles of additional road to that now built within one year from January 1st, 1867."

This act in express terms simply extended the Act of 1854 which otherwise would have expired by limitation.

It will be noted that by the terms of all of these acts it gave to the railroad company a certain amount of land to the mile for *complete* sections.

It should also be stated that the Houston & Texas Central Railroad Company became the owner of the Washington County

Railroad Company, above mentioned. The purchase was authorized by act of the legislature.

In 1869, the people of Texas adopted a new constitution, known as the "Reconstruction Constitution." Section 6, Article X, of that instrument reads as follows:

"The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and forty acres." (Sayles' Texas Statutes, Vol. 4., p. 444.)

It must be observed that by the terms and conditions of the several acts previously quoted, the Houston & Texas Central Railway Company, as the successor of the Galveston & Red River Railroad Company, was not authorized to earn any lands on any branches of its road except as specifically stated. The right to build branches other than as theretofore specially stated was relinquished in accepting the provisions of the several relief acts above mentioned. This is the attitude in which the matter stood when the constitutional provision of 1869 became the organic law of the State.

On August 15th, 1870, the legislature passed another act for the relief of the Houston & Texas Central Railway Company, which recited the fact of the purchase of the Washington County road by the Houston & Texas Central Railway Company. The first section of the act reads as follows:

"That the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston & Texas Central Railway, and shall be under the control and management of the Houston & Texas Central Railway Company in like manner as every other part of the said railway, and the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County Railroad from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by the engineers of the company. * * *

And the said Houston & Texas Central Railway Company, by reason of the construction of said railway from the town of Brenham to the city of Austin, * * * shall have and enjoy the rights, privileges, grants and benefits that are now, or may at any time hereafter be secured to any railway company in the State of Texas by any general laws of the State."

Under this act of the legislature the Houston & Texas Central Railway Company extended the Washington County road from Brenham to Austin within the time prescribed by the acts and the certificates, by virtue of which the land in suit was located, were regularly issued to the Houston & Texas Central Railway Company for the work done in extending that road.

It was contended in the court below that plaintiffs in error had a right to build the branch road from Austin to Houston by virtue of the act of February, 1853. That act, in so far as applicable, reads as follows:

"Said company (meaning the Galveston & Red River Railroad Company) is also hereby further authorized and empowered to extend said railway to the city of Galveston, and also to make and construct simultaneously with said railway described in the original act establishing said road, a branch thereof towards the city of Austin, under the same restrictions and stipulations, provided in said original acts, and subject to the rights of the State; to regulate the tolls by general law."

Our Supreme Court held that it was not necessary to determine whether that act had been repealed or not, because it was unimportant. Attention was called to the fact that the Houston & Texas Central Railway Company could not have built the road from Brenham to Austin under the Act of 1853, because it would not have been a branch with its main line and having no connection therewith. The Galveston & Red River Railroad Company had no line of railroad at Brenham at that date. And this view is strengthened by the fact that the Houston & Texas Central Railway Company deemed the Act of 1870 necessary in order to authorize the construction of the line in question, and when it was sought to construct this line it was not sought to construct it as a part of the old Galveston & Red River Railroad Company, but it, in express terms provided, that the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the Washington County Railroad from the town of Brenham in the county of Washington to the city of Austin, in the county of Travis. The Supreme Court of the State argued that as a matter of fact, the road was constructed under the authority granted by the Act of 1870, and not under any act previously passed.

Argument: The above statement has been made for the purpose of showing, first, that the Galveston & Red River Railway Company as originally chartered in 1848, did not contemplate the construction of the line of road in question; second, that the charter did not grant any land to the railroad company for the purpose of constructing its road. The amended charters did grant the amount of eight sections of land per mile, but these were superseded by the general Act of 1854 and its amendments, which gave sixteen sections per lineal mile; it was under this general act that the lands in question were claimed; third, that the right was retained by the legislature to repeal this general law at any time, and in which event the railroad company was to receive land certificates for sixteen sections of land per mile for each section of twenty-five miles of railroad actually constructed and put in running order; fourth, that the railroad from Brenham to Austin was not constructed under the Act of 1853, but under the special Act of 1870, and then not as a branch of its original line, but as a branch of the Washington County road; and fifth, that inasmuch as the Act of 1870 was not passed until after the adoption of the Constitution of 1869, which withdrew from the legislature the right to grant lands for the construction of railroads; that, therefore, the legislature had no right to give any land certificates for the construction of this particular branch of road in question, because the railroad from Brenham to Austin was to all intents and purposes a new road. It seems hardly necessary to say that the Constitution of 1869, above mentioned, repealed all existing laws in reference to the grant of lands to railroad companies. The Supreme Court of Texas has several times so held. In the case of the G. H. & S. A. Railway Co. vs. State, 81 Texas, 597, the court used this language:

"At the date of the act (meaning the Act of 1870), the power to grant lands in aid of the construction of railways had been taken from the legislature by the Constitution of 1869, and laws making such grants impliedly repealed, except as to existing rights."

In Bacon & Bates vs. Russell, 57 Texas, 416, the same court said:

"This section of the Constitution (meaning the one under discussion) evidently prohibited, not only the direct grant of land, but if prohibited every

step which could ultimate in a grant of land to other than an actual settler, and to such limited the grant to one hundred and sixty acres."

This is in line with other authorities. As an eminent text writer has stated it:

"In such cases a repeal is inferred from necessity if there be such conflict that the old and new cannot stand together." Southerland on Statutory Construction, Section 137.

"And then again it, in the nature of things (meaning repeal), would be so, not only on the theory of contention, but because contradictions cannot stand together." Southerland on Statutory Construction, page 180, and authorities there cited.

It has even been held that the adoption of a treaty where the stipulations are inconsistent with the State law is equivalent to a repeal of the State law. Dean ex demise, Frist v. Hamden, 1 Payne, 55.

Any other doctrine is absurd. Suppose the legislature had passed a law granting lands to railroad companies general in its nature just like the act of 1854, it would not of itself constitute a contract; this is the well settled rule. Christ's Church v. Philadelphia, 24 How., 300; East Saginaw Salt Company v. East Saginaw, 19 Mich., 259, 2 Amer. Rep., 82, 12 Wall., 373; Cooley on Constitutional Limitations, 347.

Now if afterwards the same legislature passes a general law and says that thereafter no lands shall be granted to the railroad company, that general law would certainly repeal by implication the statute formerly making the grant, except in so far as its terms had been accepted by railroad companies. If the legislature could repeal that statute by another statute, it is absurd to say that the people in their organic capacity cannot, by a constitutional provision, effect the same purpose. To hold otherwise is to say that the legislature, the agents of the people, can repeal by implication an act of the legislature what the people themselves in their organic capacity are powerless to effect by a constitutional provision containing the same in substance as the repealing statute. Surely the people must have as much power as the legislature, because the legislature can have no power except it be derived from the people whom they represent. We regard this question as definitely settled.

In addition to this the Supreme Court of Texas has held that the general law of January 30th, 1854, applied only to companies then chartered and for the construction of roads which their charters authorized them to build, as above shown. By the charter of the Houston & Texas Central Railway Company it was not authorized to build the road from Brenham to Austin at the date when the constitutional provision was adopted. Therefore, the general law of 1854, according to the Supreme Court of Texas had no application and conferred no right upon the company to earn lands for the construction of that piece of road. To the same effect is the case of Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 377 and 378.

It should therefore be held that inasmuch as the act of 1854 did not grant lands to any railroad companies, except such as were then in existence and for roads that it had been authorized to build before the adoption of the Constitution of 1869, and that no land could be granted for the building of the road from Brenham to Austin, because they had no authority to build that road until after the adoption of the Constitution of 1869, and the legislature was prohibited from giving it lands for that portion of said road.

FIRST COUNTER-PROPOSITION UNDER FOURTH ASSIGNMENT OF ERROR.

Inasmuch as it has been heretofore shown that there was no contract between the State of Texas and the Houston & Texas Central Railway Company to give them any lands for the construction of the line of road from Brenham to Austin, that therefore, there was no contract to be impared and there is no merit in the fourth assignment of error.

Authorities:

Argument: It has been my purpose in the argument heretofore made to demonstrate that the State authorities had no

power to issue land certificates for the construction of the particular piece of road in question. But there is another reason why the plaintiffs in error should not have been permitted to recover. The lands sued for and described in plaintiff's petition are situated in Nolan County, Texas, in what is known as the Pacific Reservation, created by special act of the legislature of May 2nd, 1873, entitled "an act to adjust and define the rights of the Pacific Railway Company in the State of Texas," and the same were located and surveyed, fourteen of them on June 1st, 1873, and two of them on June 7th, 1873. (Record p. 31, Sec. 24.)

All of the acts in question authorizing the issuance of certificates provided in express terms that they shall be located on unappropriated public domain.

The Supreme Court of Texas have construed the statute above mentioned in cases in which title to the land was claimed to have been acquired by the Houston & Texas Central Railway Company. That company claimed to have filed by virtue of 240 certificates on land situated within the same reservation set apart for the Texas & Pacific Railroad Company. The question as to whether the land within the reservation had been appropriated by that reservation was discussed by the Supreme Court of Texas, and on that point said court used the following language:

"But we are of the opinion that the companies locations were not valid for the reason that at the time the lands were attempted to be appropriated by virtue of the certificates under which it now claims they were reserved from location by the act of May 2nd, 1873, which created and defined a reservation for the benefit of the Texas & Pacific Railway Company." Jumbo Cattle Company vs. Bacon & Graves, 79 Texas, 11.

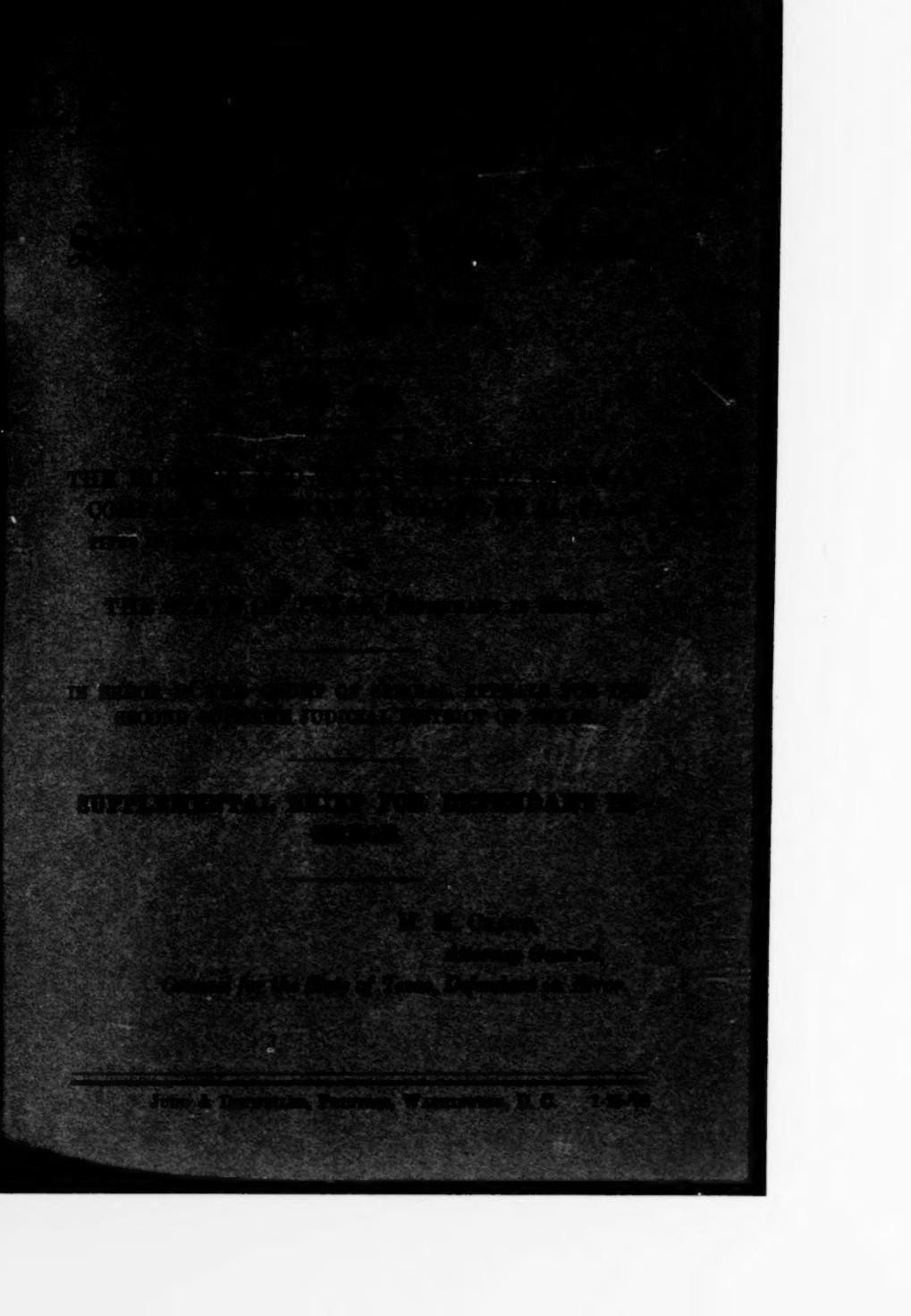
It is clear, therefore, that in no event are the plaintiffs in error entitled to recover in this case; first, because the land certificates are void, having been issued for the purpose of making a land grant to a railroad company for road constructed after the State Constitution had prohibited such grants; and second, because the certificates thus issued were located on land which had been previously reserved from location and appropriated for the use of the Texas & Pacific Railway Company. It is

plain, therefore, that there is no merit in the twenty-fifth assignment of error which complains because the Court of Civil Appeals affirmed the judgment of the lower court.

It is therefore submitted that the case should be in all things affirmed.

M. M. CRANE, ATTY.-GEN'L.

Counsel for the State of Texas, Defendant in Error.



IN THE
Supreme Court of the United States.
OCTOBER TERM, 1897.

No. 406.

THE HOUSTON AND TEXAS CENTRAL RAILWAY
COMPANY, FREDERICK P. OLCOTT, ET AL., PLAINTIFFS IN ERROR,

v/s.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR IN THE COURT OF SPECIAL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

**SUPPLEMENTAL BRIEF FOR DEFENDANT IN
ERROR.**

I beg to submit the following in reply to the brief filed in behalf of the plaintiff in error:

The suit is for land claimed by plaintiff in error as a donation for constructing a branch road from Brenham, Texas, to Austin, Texas.

The case will be better understood by referring to a few

sections of the several acts of the Texas legislature upon which the railroad company bases its right to the land in controversy.

The Houston and Texas Central railway has not always existed under that name. It was first chartered under the name of the Galveston and Red River Railroad Company. This occurred in 1848. (See Appendix to Brief of Plaintiff in Error, pages 1 to 6, inclusive.) It is worthy of note that by the terms of the charter no land was granted to the railroad company. This charter, thus granted by special act of the legislature, was amended by another special act, the terms of which were accepted on February 14, 1852. (See Appendix to Brief of Plaintiff in Error, pages 6 to 13, inclusive.)

Section 14 of the act last named granted to the Galveston and Red River Railroad Company eight sections of land of six hundred and forty acres each for every mile of railroad actually completed by them and ready for use, etc. It further provided that certificates should be issued for the road thus completed, and added: "Such certificates shall be for six hundred and forty acres each and shall be located upon any unappropriated public domain in the State of Texas within twelve months thereof, which date shall appear upon the face of each certificate." (See Appendix to Brief of Plaintiff in Error, page 15.) — — — — —

On February 7, 1853, the Texas legislature authorized the Galveston and Red River Railroad Company to build a branch road "towards the city of Austin," the authority being granted, among other things, in the following language:

"SECTION 2. The said company is further authorized to extend said railroad to the city of Galveston, and also to make and construct, simultaneously with the amount of railroad stipulated in the original acts establishing said company, a branch thereto toward the city of Austin under the restrictions and stipulations of said acts and subject to the right of said State to regulate the tolls by general law."

The record does not disclose that this special act was at any time accepted by the railroad ; it is not shown that it so ever extended its line to the city of Galveston, and, indeed, it has not done so, nor is it shown that it attempted to extend the road " toward the city of Austin " until 1870, and thereafter by virtue of more specific legislative authority. But it is wholly immaterial whether the road in question was constructed by virtue of the act of 1853 or of 1870 ; no land was granted by either act. As a matter of fact, however, the road was not built by authority of the act of 1853, but by authority of the act of 1870. (H. & T. C. vs. Tex., 40 S. W. Rep., 402, 403.)

On January 30, 1854, the Texas legislature passed a general law granting to railroads then in existence sixteen sections of land for every mile of road that should be constructed and put in running order, upon certain conditions therein stated, but not necessary now to discuss. Section 12 of that act, in so far as applicable, is in the following language :

"That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single track road with necessary turnouts, and any company now entitled by law to receive the grant of eight sections of land per mile for the construction of any road, accepting the provisions of this act, shall not be entitled to

receive any grant of land for any branch road. *Provided*, This act shall not be so construed as to give any company now entitled by law to receive eight sections of land more than eight additional sections.

* * * * *

And further provided, That the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled previous to the passage of this act. *And further provided*, That this act shall continue in force for the term of ten years from the time it shall take effect and no longer." (Appendix to Brief of Plaintiff in Error, pages 28 and 29.)

On January 23, 1856, the Texas legislature passed an act for the relief of the Galveston and Red River railroad, the terms of which the said railroad accepted. Section 6 of that act reads as follows:

"SECTION 6. That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30th, 1854, entitled An act to encourage the construction of railroads in the State of Texas by donations of land; *Provided*, That the right to lands acquired before said repeal or modifications shall in all cases be protected." (See Appendix to Brief of Plaintiff in Error, page 35.)

From the foregoing it is plain—too plain for argument, indeed—that the act of 1854, under which the land in controversy is claimed, undertook to grant lands, or, in other words, promised lands for the construction of main lines only, branch lines being specifically excluded from the benefits of the act. It becomes, therefore, immaterial to inquire whether the road from Brenham to Austin, for which these lands were claimed, was constructed under the authority of

the act of 1853 or not, because the act of 1854 did not give any land for the construction of branches, but only for the main lines. Let it be conceded, for argument's sake, that it had the right to build this line of road under the terms of the act of 1853, and that it was built by authority of that act. Its rights in this case would remain unchanged. It would have the naked privilege of building the road, but could claim no donations of land therefor, and inasmuch as its right to construct and operate the road is not contested, it is immaterial whether the right was granted by the act of 1853 or by some other act; but it is insisted in the brief of the plaintiff in error, herewith filed, that because of the right to construct this road it had the right to the lands secured by general law.

Counsel for plaintiff in error forgot that the general law gave no land for the construction of branch lines. Had they based their claim for land on the charter as amended, which gave eight sections per mile, their contention would not be so flagrantly wrong; but they have elected to claim under the general statute passed in 1854 and the acts amendatory thereof (Rec., p. 16). Moreover, they are claiming sixteen sections of land per mile, while the amended charter gave them only eight. They cannot claim under both. The language of the act of 1854 makes that impossible. Claiming under the general law of 1854, the plaintiff in error is bound by its terms. It having provided that no railroad company then authorized to receive *eight sections of land per mile should be entitled to receive any lands for any branch road*, and it being true that plaintiff in error was entitled by the terms of its amended charter to receive

eight sections per mile, it cannot receive any land for the construction of the *branch line in question*.

By the terms of the special act of 1856 above cited relief was extended by the State of Texas to the Galveston and Red River Railroad Company. In passing that act the legislature reserved the right to repeal or modify the land-grant act of 1854, upon which the claims of plaintiffs in error are based. The rights of the railroad company to land acquired *before the passage* of the repealing act were to be protected. The terms of that act were accepted by the railroad company along with the relief which it carried. This court has often announced the rule that the Government may withdraw an offer made in a general statute at any time before its acceptance. This rule is fortified in this case by the contract above mentioned, as set out in the special act of 1856. It seems clear, therefore, that the State of Texas had the right to repeal the act of 1854 by the constitution of 1869. The railroad company had no right to complain, so long as its rights to land *theretofore acquired* should be respected. Inasmuch as the lands herein involved were acquired after the repeal of the act of 1854, the right of the State to recover them should be admitted.

On the 2nd of February, 1856, the State of Texas, by a special act, incorporated the Washington County Railroad Company. (See Appendix to Brief of Plaintiff in Error, pages 36 to 45, inclusive.) This company was subsequently merged into the Houston and Texas Central Railroad Company. Section 14 of the act of incorporation of the Washington County Railroad Company is as follows:

"SECTION 14. That this company shall be subject to the provisions and be entitled to the benefits of any general

laws which have been or may be enacted by the State rewarding and encouraging the construction of railroads, and that this act take effect from its passage."

It will, therefore, be noted that the Washington County Railroad Companies' claim to lands was also based upon the general act of 1854 and laws amendatory thereof. There was no land grant in its charter, and, therefore, no contract with the State until such time as the terms of the general law should have been accepted by the completion of stated sections of its road. In 1856 the Galveston and Red River Railroad Company's charter was so amended as to authorize the change of its name to that of the Houston and Texas Central Railroad Company. (See Appendix to Brief of Plaintiff in Error, pages 46 to 48.) From that date until the present, that road has been recognized as a part of the Houston and Texas Central Railway Company. In 1888 or 1889, its name was changed to the Houston and Texas Central Railroad Company, but this last fact is immaterial in this case.

On February 4, 1858, the Texas legislature passed a special act for the relief of the Houston and Texas Central Railway Company, exempting it from certain forfeitures and penalties which it had incurred, but requiring it to complete the other sections of its road within the time therein stated. Section 2 of this act, however, contained the following provision : "*Provided, That the benefits of the provisions of any general law shall only inure to the said railroad company whilst said law shall remain in force*"—(See Appendix to Brief of Plaintiff in Error, page 50)—accepting the terms of this act.

The Houston and Texas Central Railway Company was

bound by its terms. This it twice stipulated in clear and unambiguous language that the State should have the right to repeal the general law under which it claims its lands, and that the railroad company shall receive no benefit from that general law after its repeal by the State. The rights of the State then were secured.

First. By the general provision that the State might at any time repeal the general law which confers bounty on the railroad company. (*Salt Company vs. East Saginaw*, 13th Wallace, 373, 376.)

Second. By the contract solemnly entered into by the State and the railroad company that the right thus mentioned was reserved. This was secured by the act last mentioned as well as by the terms of the special act of 1856, heretofore cited.

The act of 1861 recognized this fact. (See Appendix to Brief of Plaintiff in Error, page 51.) This fact is also shown by the act for the relief of railroads, passed in 1862, the first section of which reads as follows:

"The failure of any chartered railroad company of this State to complete the sections or construct the sections of its road under the existing laws shall not operate as a forfeiture of its charter or of the lands to which said company shall be entitled under the provisions of the act entitled An act to encourage the construction of railroads in the State of Texas, under the acts of 1854 and the subsequent acts supplementary thereto."

Section 4 of the act required the Houston and Texas Central Railroad Company to restore certain of its stockholders be-

fore it could accept the benefits of the act of 1854. The act of 1854 was extended in its terms for the period of ten years by the act of 1866. The special act of the legislature, as incorporated in the brief of the plaintiff in error, passed in 1866, the plaintiff in error did not rely upon in the court below. Though a special act, it was not pleaded, and, indeed, if it had been pleaded, it would not affect the rights of the parties.

An examination of the act of 1866 will show that it granted land to the Houston and Texas Central Railway Company, but with this limitation: And said railroad company shall construct their road on the line heretofore prescribed by the act for the Houston and Texas Central Railway Company, approved February 8, 1861 (Appendix to Brief of Plaintiff in Error, page LXI). The line prescribed by the act of 1861 was the main line and not the Austin branch. (Act of 1861, Appendix to Brief of Plaintiff in Error, pages LI and LII.)

There is nothing said about a branch line to Austin; indeed, it was not contemplated at that time, because the consolidation with the Washington County Railroad Company had not been accomplished.

The question was asked: What was the necessity of the act of 1866 if it had only repeated the language of the general law passed in the same year? A re-examination of the two acts leads me to this conclusion: That the general law of 1866 contained a provision which I had overlooked and to which attention was not called in the brief by the counsel for the plaintiff in error. The latter part of section 4 of the general act reads as follows: *Provided*, That all tap roads

over 25 miles long shall be entitled to the benefits of this act. (Appendix to Brief of Plaintiff in Error, page LXII.)

The singular part of this provision is that the original act of 1854, which it sought to extend for a period of ten years, expressly excluded branch roads from any benefits thereunder. I assume, therefore, that when the special act of 1866 was passed it sought to clear up any confusion produced by the words of the general law to the effect that the words "tap roads more than 25 miles long" might include branch roads. Therefore the special law of 1866 referred to the Houston and Texas Central Railway Company and limited its land grant in express terms to the line which was therein specifically named. This was the main line and not the Austin branch. This makes clear the fact that, whatever may be said as to the rights of other roads, the Houston and Texas Central should get nothing for branches or "tap roads."

In so far as the ordinance adopted by the constitutional convention of 1868 is involved, it is sufficient to say that it was never ratified by vote of the people. This fact was overlooked by the supreme court of Texas in the several cases cited in the brief of the plaintiff in error; but in a recent case the supreme court has announced the rule that the ordinances in question, never having been ratified by the people of Texas, are no part of the constitution of the State, are inoperative and void. (*Quinlan vs. The H. & T. C. Ry*, 89th Tex., 356, 376.)

It is insisted, however, that this ordinance was ratified by the legislature of 1870. The answer to this is, first, that the act of the legislature of 1870 does not purport to be a revision of the constitutional amendment, but is an independent

act, not reaching back, but "only operative prospectively from the date of its passage;" second, the legislature was without power to ratify the ordinance, to validate which the vote of the people was necessary. This is so plain that it is not deemed necessary to elaborate further than to say that the legislature can never validate an act which it was powerless to authorize. The legislature did not have power to authorize the adoption of this ordinance as a part of the constitution, and therefore it could not ratify it afterwards. (*Quinlan vs. H. & T. C. R'y*, 89th Tex., 356, 376.)

This much has been said by way of argument and statement to show that the land certificates issued and located on the land in question were unauthorized by law, and therefore void. In addition to this, however, the act authorizing the issuance of certificates to be donated to the railroads required them to be located on lands not otherwise appropriated. To this point attention was called in the brief filed herein. Indeed, it has been adjudicated between the State of Texas and the Houston and Texas Central Railway Company that the certificates in this case are located in the same territory and were improperly located, in that the lands sought to be thereby appropriated had been reserved from location for the use of the Texas and Pacific railroad. (See Record, page 31, section 24; *Jumbo Cattle Company vs. Bacon & Graves*, 79th Tex., 11.)

It is therefore respectfully submitted that the following propositions, based upon the statements herein made, fairly state the law of this case:

1st. That the Galveston and Red River Railroad Company and its successor, the Houston and Texas Central

Railway Company, as well as the Washington County Railroad Company, which was merged in the Houston and Texas Central Railway Company, were not entitled to any lands for the construction of their roads by the terms of their charter, save and except the Galveston and Red River Railroad Company, which was entitled to eight sections of land per mile.

2d. That the Galveston and Red River Railroad Company and the Houston and Texas Central Railway Company accepted donations of land under the general act of 1854, in lieu of the amount promised in their amended charter, and that the lands herein claimed were received by them by virtue of the general law only, and that the general law, in express terms, forbade the granting of land for any branch road; that the road from Brenham to Austin is a branch road, the main line extending northward to Red river, and that therefore, under the terms of the act of 1854, they were not entitled to any land for the construction of said branch.

3d. That the State of Texas in the several relief acts which were accepted by the Houston and Texas Central Railway Company stipulated with said company that it should have the right to modify or repeal the act of 1854 whenever it chose, and that after such repeal no lands should be granted to the railroad company other than those acquired previous to said repeal.

4th. That the special acts and ordinances set out in the brief of the plaintiff in error do not give nor pretend to give to the railroad company any lands for the construction of

branch roads, and therefore they are irrelevant and immaterial. If any right was thereby secured to plaintiff in error, it was the naked privilege of building the branch road in question without a land grant.

5th. That inasmuch as the land grants herein claimed by the brief of the plaintiff in error are based upon a general law, the State had the right, inherent in itself as well as by the contract above mentioned, to repeal that law at any time it chose; and having exercised that right and repealed the law, the lands in question having been thereafter acquired, were obtained without authority of law, and the State is entitled to reclaim them.

6th. That all of the lands herein claimed have been located not later than 1874 (see Record, subdivision 12, page 19). The amendment to the State constitution adopted in 1873 is immaterial, because it is not self-executing and was not executed by act of the legislature until 1876, after the acquisition of the land in question.

It is therefore respectfully submitted that the case should be affirmed.

(Signed)

M. M. CRANE,

Attorney General, Counsel for the State of Texas.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY v. TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 406. Argued January 24, 25, 1898. — Decided April 25, 1898.

In *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, ante, 226, the grants of land repealed by the operation of Section 6 of Article X of the constitution of Texas of 1869, were grants to aid in the construction of lines of railway not authorized until after that provision took effect; whereas, in this case, the grants which are claimed to be affected by it were grants made prior to the adoption of that constitution, for the purpose of aiding in the construction of the road from Brenham to Austin. Held, that that constitutional provision, as thus enforced, impairs the obligation of the contract between the State and the railway company, and cannot be sustained.

Argument was urged on behalf of defendant in error that the particular lands sued for are situated in what is known as the Pacific reservation, being a reservation for the benefit of the Texas and Pacific Railway Company, created by a special act of May 2, 1873, and hence, that though the certificates were valid, they were not located, as the law required, on unappropriated public domain. This question was not determined by either of the appellate tribunals, but, on the contrary, their judgments rested distinctly on the invalidity of the certificates for reasons involving the disposition of Federal questions. This court therefore declines to enter on an examination of the controversy now suggested on this point.

THIS was a suit instituted by the State of Texas in the District Court of Nolan County, Texas, February 3, 1890, to recover of the Houston and Texas Central Railway Company and the purchaser under it, sixteen sections of land of 640 acres each, located in that county by virtue of certificates issued by the State to the railway company. It was alleged

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that the certificates were issued by the commissioner of the general land office of Texas without authority of law, and that the action of the commissioner in issuing and delivering them and permitting them to be located and allowing the lands to be surveyed thereunder, and in receiving and filing the field notes in the general land office of the State, was without authority of law and in violation of the constitution and laws of the State at that time. And also that the certificates were located in territory reserved by an act passed May 2, 1873, for the location of certificates issued to the Texas and Pacific Railway Company. It appeared from the State's complaint that the certificates were a part of those issued for the construction and completion of about ninety-four miles of main track and about two and one half miles of side track of that part of the company's railway extending from Brenham to Austin.

The District Court gave judgment in favor of the State, which was affirmed by the Court of Civil Appeals. 36 S. W. Rep. 819. Application was made to the Supreme Court of the State for a writ of error, which was denied. 40 S. W. Rep. 402. This writ of error was then allowed.

The Galveston and Red River Railway Company was incorporated by a special act of the legislature of Texas, approved March 11, 1848. Special Laws, 1848, 370. By the second section of that act the company was "invested with the right of making, owning and maintaining a railway from such a point on Galveston Bay, or its contiguous waters, to such point upon the Red River, between the eastern boundary line of Texas and Coffee's station, as the said company may deem most suitable, with the privilege of making, owning and maintaining such branches to the railway as they may deem expedient."

A special act supplementary to that act was approved February 14, 1852, c. 148, by section 14 of which there was granted to the company "eight sections of land of six hundred and forty acres each, for every mile of railway actually completed by them and ready for use;" and provision was made for the inspection of the road from time to time by the state

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engineer, or a commissioner to be appointed by the Governor, as any section of five miles thereof should be completed, on whose certificate that said section had been completed in a good and substantial manner and ready for use, the comptroller should give information of that fact to the commissioner of the general land office, whose duty it should be to issue land certificates for the lands thus granted, which should be located upon the public domain of the State, survey be made, the field notes returned, and patents issued. Special Laws, 1852, 142.

By another special act of February 7, 1853, the preliminary action of the incorporators in commencing the survey and grade of the railway at the city of Houston was confirmed; and by section two, the company was "further authorized and empowered to extend said railway to the city of Galveston, and also to make and construct simultaneously with the main railway, described in the original acts establishing said company, a branch thereof towards the city of Austin, under the same restrictions and stipulations provided in said original acts, etc." Special Laws, 1853, Extra Session, 36, 37.

January 30, 1854, the legislature passed a general law granting sixteen sections of land to the mile for constructed railroad, which is sufficiently set forth in the preceding case, as well as the supplementary act approved the same day. It was provided that companies accepting the provisions of the act and already entitled to eight sections per mile should not be entitled to receive any grant for branch roads.

January 23, 1856, the legislature passed a special act, c. 20, entitled "An act for the relief of the Galveston and Red River Railway Company, and supplementary to the several acts incorporating said company," by which, after providing that the company should have six months after January 30, 1856, to complete the first twenty-five miles of its road, commencing at the city of Houston, it was declared that "said company shall be entitled to the rights, benefits and privileges granted by an act approved January thirtieth, eighteen hundred and fifty-four, entitled 'An act to encourage the construction of railroads in Texas by donations of land,'

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upon the completion of said twenty-five miles within said six months," etc., upon certain conditions, to wit: That the company should construct twenty-five miles of its road each year after the expiration of said time; that it should maintain its principal office and keep its records on the line of its road; that a majority of its directors should reside in the State; that it should build its main line to a certain point before commencing any branch road; that the act of February 7, 1853, to regulate railroads should apply to the charter; and that it should "yield all general branching privileges, except such as are expressly granted by the provisions of its charter to certain points, and shall be required to expend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed for any branch, and shall be required to complete its main trunk to the point on Red River contemplated in its charter, or to such point of intersection between said road and some other road running from the northern or eastern boundary of Texas towards El Paso, as shall be agreed upon between the directors of said company." It was provided that the company might assign certificates for lands granted it; that it might borrow money for the construction of the railway and secure the same by mortgage and the issue of bonds; and that it should have the right after location and survey of the lands granted it, or any part thereof, to mortgage or sell any part of the same. The sixth section read: "That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land; ' provided, that the right to lands acquired before said repeal or modification shall in all cases be protected." Special Laws, 1856, 28, 30.

By another special act approved September 1, 1856, c. 351, the Galveston and Red River Railway Company was authorized to change its name to "The Houston and Texas Central Railway Company," and it was also provided that the failure of the company to build the second section of its road within

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one year after the completion of the first section should not work a discontinuance as to said company of the benefits of the general act of January 30, 1854, or of any other general or special laws relative to railroads, "if said company shall have completed their second and third sections, amounting to at least fifty miles, at the expiration of two years after the construction of said first section." Special Laws, 1856, 259, 260.

By another special act passed February 4, 1858, c. 86, it was, among other things, provided that the failure of the company to complete the third section of its road by July 30, 1858, should not work a discontinuance as to the company of the benefits of the act of January 30, 1854, or any other general laws in reference to railroads, if the company should complete the third section by July 30, 1859, and that on the completion of subsequent sections of twenty-five miles annually after July 30, 1859, or fifty miles every two years, "said company shall be entitled to sixteen sections of land per mile, as contemplated in said last-mentioned act, for each section so completed;" and "that the benefits of the provisions in the general laws shall only inure to the said company while said laws shall remain in force." Special Laws, 1858, 94, 95.

By still another special act, approved February 8, 1861, c. 13, any failure to complete the fourth and fifth sections was condoned, and the company given until January 30, 1863, in which to complete those sections. Special Laws, 1861, 11, 12.

When the civil war began in 1861, the company had completed and had in operation its main line for about eighty miles from the terminus at Houston. January 11, 1862, the legislature passed two general acts, continuing in force all laws granting lands to railway companies and extending the time in which they were required to construct certain parts of their lines until two years after the close of the war. These acts provided that the president and directors of this railway company should, before the provisions of the acts might extend to the benefit of the company, pass a resolution restoring the original *bona fide* stockholders of the company to the rights, privileges and immunities to which they were entitled previous

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to the sale of the road as mentioned in the acts, provided the stockholders should pay into the treasury of the company ten per cent upon their stock on or before the expiration of the extension of time provided, or otherwise should forfeit their rights, privileges and property interests as stockholders. Laws, 1862, c. 69, pp. 43, 44, 46, 47. The resolution required by these acts was duly passed by the company.

On September 21, 1866, a special act was passed, entitled "An act granting lands to the Houston and Texas Central Railway Company," by which a specific grant was made to that company "of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, 'in accordance with the provisions of the charter of said railroad company ;'" provided that the lands theretofore received under the general act of January 30, 1854, should be deducted from the grant thus made, and that the certificates issued on the first three sections should "be included in the terms, benefits and conditions of this act as if issued by virtue of its provisions ;" and that the company should construct and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1, 1867, or fifty miles within two years from that date; and that the road should be put in running order to Bryant's station by September 1, 1867. Provision was made for the inspection of the road from time to time as sections should be completed, and for the issue and location of certificates and the survey of the lands thereby granted. Special Laws, 1866, c. 10, pp. 33, 34.

November 13, 1866, a general law was passed whereby the grant of sixteen sections per mile under prior laws was continued for ten years from that date. Laws, 1866, c. 174, p. 212. This act also provided that "all tap roads over twenty-five miles long shall be entitled to the benefits of this act."

By the constitution of 1869, Art. 12, § 43, the statutes of limitation of civil suits were declared suspended by the act of secession of January 28, 1861, and to be considered as suspended until the acceptance of that constitution by Congress, which acceptance occurred March 30, 1870.

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The Washington County Railroad Company was incorporated by a special act approved February 2, 1856, and was invested "with the right of locating, constructing, owning and maintaining a railway commencing at such point on the trunk of the Galveston and Red River Railroad as said corporation shall deem most suitable, crossing the Brazos River within the limits of Washington County, and then running by the most suitable and direct line to Brenham in said county." Special Laws, 1856, 49. This railroad company was organized and thereafter constructed and put in running order from a junction with the Houston and Texas Central Railway Company at Hempstead, thence directly towards the city of Austin to Brenham, a distance of twenty-five miles.

Some time prior to August 29, 1868, the Houston and Texas Central Railway Company purchased the Washington County Railroad at foreclosure sale. On that day the convention which had assembled to frame a new constitution, and which did frame the constitution adopted in 1869, passed an ordinance, reciting that the Houston and Texas Central Railway Company had become the owner, by purchase, of the Washington County Railroad; that both of said companies were indebted to the State for sums borrowed from the special school fund; and that the Houston and Texas Central Railway Company desired to extend the Washington County branch to the city of Austin as soon as it could be done, and to extend its main line to Red River; and it was declared "that the Washington County Railroad is hereby made and declared to be a branch of the Houston and Texas Central Railroad, and shall henceforth be known and called the 'Western Branch of the Houston and Texas Central Railway,' and shall be controlled and managed by said Houston and Texas Central Railway Company, and the Houston and Texas Central Railway Company shall have the right to extend said western branch of their road from the town of Brenham, in Washington County, to the city of Austin, in Travis County, by the most eligible route as near an air line as may be practicable."

The same convention also passed, December 23, 1868, a

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"declaration for the relief of the Houston and Texas Central Railway Company," which provided that the company should not suffer "any forfeiture of any rights secured to it by existing laws by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robertson County, by the first day of January, A.D. 1869, as required by the act of the 21st of September, A.D. 1866, provided said railway shall be constructed and put in good running order for the use of the public, to the said town of Calvert, by the first day of April, A.D. 1869."

The constitution framed by this convention was adopted by a vote of the people, at an election held November 30 to December 3, 1869, and was accepted by Congress March 30, 1870, 16 Stat. 80, c. 39. Section 6, article X, of that constitution, read as follows:

"The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

August 15, 1870, the legislature of Texas passed a special act entitled "An act for the relief of the Houston and Texas Central Railway Company," which recited substantially the same matters as were recited in the declaration of the convention, and provided in section 1 as follows:

"That the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of said railway, and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the 'Washington County Railroad' from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro County and striking Red River at such point as will

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enable such railway company to make a connection with any railroad which may be built to said river from the northward; and the said Houston and Texas Central Railway Company, by reason of the construction of said railway from the town of Brenham to the city of Austin, and by reason of the construction of said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter, be secured to any railroad company in the State of Texas by any general law of the State, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon the said Houston and Texas Central Railway Company by its charter and by other laws of the State."

Section 4 read thus:

"No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company, by reason of its failure to comply with the conditions as to construction, imposed by the first section of the act of the twenty-first of September, A.D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company;' but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A.D. 1866, had been, in all respects, complied with; provided that the land grant to said company shall cease, unless the said company shall complete their main trunk, east of the Brazos River, to Richland Creek, in Navarro County, within twelve months from the first day of October, A.D. 1870, and shall also complete their road to the city of Austin within two years after the passage of this act." Special Laws, 1870, 325.

The company completed its road to the city of Austin December 25, 1871, and completed its main line to Richland Creek, September 26, 1871.

Section 6 of article X of the constitution of 1869 was amended as of March 19, 1873, so as to authorize the legislature to grant lands for purposes of internal improvement. Thereupon the legislature of Texas passed many special laws

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granting lands to railroads, and, afterward, on August 16, 1876, the legislature passed another general law granting sixteen sections of land per mile in aid of the construction of railroads. *Laws, 1876*, 153.

It appeared "that the defendants paid taxes on the lands sued for continuously since they were located and up to the present time," and "that the defendants paid all the fees of locating and surveying the said lands sued for, as well as for the same number of alternate sections known as the even numbers for the public free-school fund." Application for the inspection of the Austin line, as well as for the main line to Corsicana, was made by the company to the Governor February 9, 1872, which was done, and report showing the completion of the road made February 21, 1872. The certificates were issued in July of that year. The lands were placed on the maps of the general land office and always recognized as the company's land. They were all mortgaged by the company and sold on foreclosure in September, 1888.

Mr. R. S. Lovett for plaintiff in error. *Mr. James A. Baker* and *Mr. J. P. Blair* were with him on the brief.

Mr. M. M. Crane, attorney general of the State of Texas, for defendant in error.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The Supreme Court of Texas held in *Galveston, Harrisburg & San Antonio Railway Company v. Texas*, 89 Texas, 340, that, conceding that section six of article ten of the constitution of 1869 did not repeal prior laws granting lands in aid of the defined lines of existing railroad companies, the section did operate to cut off the right to earn lands by the construction of lines not authorized until after the provision took effect. We have just considered that case, and expressed the opinion that the constitutional provision as thus enforced involved no infraction of the Constitution of the United States.

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In the present case the state courts have decided that although the Houston and Texas Central Railway Company may have had the right under legislation prior to the adoption of the constitution of 1869 to construct a road from its main line to Austin and to earn lands by such construction, yet that the purchase by the company prior to 1869 of the Washington Railroad, running from Hempstead on the company's main line to Brenham in the direction of Austin, should not be treated as making that road part of the line the company was authorized to build; and that the extension from Brenham to Austin must be held to have been built as an independent line under the act of August 15, 1870, which, having been passed while the constitution of 1869 was in force, the company could not acquire any right to the land grant by the construction of road between the latter points. The question does not arise in respect of lands for the twenty-five miles from Hempstead to Brenham, but in respect of lands allowed as earned for the distance from Brenham to Austin, for which the certificates were duly issued, and were located; and which have always prior to this suit been recognized as lands of the company, and have been sold as such.

In other words, the state courts have applied to the road from Brenham to Austin the same rule laid down as to new lines authorized to be constructed, for the first time, after the constitution of 1869 was adopted. We cannot concur in this view, but, on the contrary, are of opinion that the constitutional provision as thus enforced impairs the obligation of the contract between the State and the company and cannot be sustained.

The Houston and Texas Central Railway Company, then styled the Galveston and Red River Railway Company, was authorized by its act of incorporation not only to construct the main line therein specified, but, by its second section, such branches as it should deem expedient; and by the fourteenth section of the special act of February 14, 1852, eight sections of land were granted to the company for every mile of railroad it should construct, no distinction being made between branch and main lines. By section 2 of the special act of

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February 7, 1853, the company was empowered "to make and construct simultaneously with the main railway described in the original acts establishing said company, a branch thereof toward the city of Austin."

The general act of January 30, 1854, granted to all railroad companies constructing a section of twenty-five miles or more of railroad, sixteen sections of land for every mile of road so constructed and put in running order; though by section 12 it was provided that any company then entitled to a grant of eight sections of land per mile, which should accept the provisions of the act, should not be entitled to receive the grant thereby made for any branch road. This company was then entitled to eight sections per mile, but the special act of January 23, 1856, supplementary to the several acts incorporating the company, expressly extended the rights, benefits and privileges of the general act of January 30, 1854, to the company, subject to certain conditions not material to be enumerated, and with the limitation as to branch lines that the company should "yield all general branching privileges *except such as are expressly granted by the provisions of its charter to certain points.*" and requiring it to spend on the branch only the money subscribed for the branch, and on the trunk only the money subscribed therefor.

By section two of the original act of incorporation general branching privileges had been conferred, and by section two of the special act of February 7, 1853, express authority to construct a branch to the city of Austin. It would seem plain then that section five of the act of January 23, 1856, distinctly referred to the right to construct this particular branch, and so preserved it that the benefits of the act of January 30, 1854, were extended to that branch and its construction, and no other. In other words, all branching privileges except for the Austin line were yielded in accepting the benefits of the act of 1854, but as to that expressly authorized branch the right to construct it was preserved with the benefits accorded to its construction. The act of February 4, 1858, repeated the assurance of the benefits of the act of 1854.

But it is said that by the sixth section of the act of 1856

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the right to repeal or modify the act of 1854 was reserved, and that by the second section of the act of 1858 the benefits of any general law inured only so long as such law remained in force. Rights to lands acquired before such repeal or modification would not, however, be affected thereby, nor is it important to specially discuss the operation of the constitution of 1869 in this regard, as the special act of September 21, 1866, made a specific grant to the company of "sixteen sections of land of six hundred and forty acres each of every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said company." We think that this plainly applied to the construction of the Austin line as well as the main line of the company. It applied to all lines constructed by the company in accordance with the provisions of its charter. And the right to construct the Austin line had been specifically conferred by the special act of February 7, 1853. The general branching privileges which the company possessed under its original act of incorporation it had been required to surrender by the act of 1856, except such as were "expressly granted by the provisions of its charter to certain points," and Austin was a point to which the company was expressly authorized to build. So that the Austin branch was one of the lines covered by the charter when the act of September 21, 1866, was passed, and the grant thereby made applied to it. And there was no reservation of a right to repeal or modify the act.

This legislation secured the construction of the branch to Austin, the capital of the State, an obvious necessity, and especially as that important point was then without any line of railway whatever.

Counsel for the State contended that the act granted lands for the construction only of the main line and not of the Austin line. The last clause of the third section of the act was: "And said railroad company shall construct their road in the line heretofore prescribed by 'An act for the relief of the Houston and Texas Central Railway Company,' approved February the 8th, 1861."

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The line defined in the act referred to was: "*Provided*, said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro County, and thence to the town of Dallas, or within one and a half miles of said town, and thence to the terminus of the Red River, within fifteen miles of Preston." Special Laws, 1861, 11.

This fixed the route of the main line by Dresden and Dallas to the vicinity of Preston instead of Coffee's station. The route of the Austin line had been provided for by the act of February 7, 1853, and there was evidently no occasion to change it.

But it does not follow that because of this definition of the main line in the third section the grant in the first section of the act of September 21, 1866, should be confined to that line.

The company already had a grant of sixteen sections per mile for its main line under the general act of January 30, 1854, and there was no controversy over that, nor any need of further legislation in that regard when this act was passed. As to the branch line there might be dispute, and, furthermore, the right to repeal the grant was reserved in the acts of January, 1856, and February, 1858; and it may well be assumed that the object of the act of September 21, 1866, was to remove any doubt on the subject of the grant for the Austin line and remove the danger of a possible repeal. We are the more constrained to this conclusion by the language of the subsequent general act of November 13, 1866, "that all tap roads over 25 miles long shall be entitled to the benefits of this act," which modified the policy as to branch roads indicated in the act of 1854.

We find then that the company was granted by the State prior to the adoption of the constitution of 1869, sixteen sections of land per mile for the construction of the Austin line by the special act of January 23, 1856, and by the special act of September 21, 1866. And the rights of the company to the lands granted were preserved by extensions of time, as occasion required, within which to comply with conditions respecting the rate of construction. By the act of September 1, 1856,

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the failure of the company to complete the second section of its road within one year after the completion of the first section was waived; again by the act of February 4, 1858, the company was granted further time in which to complete construction; again by the act of February 8, 1861, it was given until January 30, 1863, to perform the work required of it; and during the war the laws of January 11, 1862, were passed extending the time until two years after the close of the war on the condition that the extension should inure to the benefit of the company only in the event that it should restore the rights of the stockholders which had been foreclosed, which condition was complied with by the company; after this further time was given by the act of September 21, 1866; again by the act of November 13, 1866; and again by the ordinance of December 23, 1868; and finally by section four of the special act of August 15, 1870.

Before the constitution of 1869 was adopted, the company had acquired the Washington County Railroad, and the convention which framed that instrument on August 29, 1868, ratified and confirmed the purchase of that road, and declared that the Washington County Railroad was thereby made and declared to be a branch of the Houston and Texas Central Railroad, to be controlled and managed by the Houston and Texas Central Railway Company, with the right to extend the road from Brenham to Austin by the most eligible route.

The company had completed and had in operation five sections of twenty-five miles each of its main line, and by the acquisition of the Washington County Railroad, had in operation that part of the Austin branch extending from the junction of the main line at Hempstead to Brenham directly toward Austin.

Thus it is seen that the company had been granted sixteen sections of land per mile for the construction of the Austin branch as well as the main line; that it had accepted the grant; and had commenced to earn it, and had actually acquired the right to earn it, by the construction of an important part of the line which the State by the grant intended to promote, before the adoption or acceptance of the constitution of

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1869. The company had not merely organized and commenced the work it was incorporated to carry on, but had completed a large part of it. It had completed one hundred and twenty-five miles of main line prior to June 15, 1869, and manifestly had much more in process of construction, for it appears from the record that several additional sections were completed and put in operation soon after that date. It had also acquired and had in operation that part of the Austin branch extending from the junction at Hempstead to Brenham, a distance of twenty-five miles, originally constructed by the Washington County Railroad Company and afterwards purchased by this company.

We do not understand the state courts to have decided that the purchase of the Washington County road was *ultra vires*, but to have held that the construction of the line from Brenham to Austin was an independent enterprise authorized for the first time by the act of August 15, 1870, and being a new and additional line no land grant could be claimed for it because the constitutional provision was then in force.

In our opinion, however, if the Washington County road was lawfully acquired by the Houston and Texas Central Railway in 1868, it became as much a part of the Austin branch as if it had been constructed by the company, and its subsequent completion to Austin placed that part of the line from Brenham to Austin in the same situation as if the entire line from Hempstead to Austin had been in fact so constructed. And this would have been so if the company had built ninety-five miles from Hempstead towards Austin, and then lawfully obtained twenty-five miles of existing road to complete the branch. Of course the company was not entitled to a land grant for the twenty-five miles from Hempstead to Brenham, nor is any such claim made, but that twenty-five miles became by the purchase a part of the branch with like effect as if originally part of it, and to treat the completion of the branch as a new and independent enterprise we cannot but regard as inadmissible in view of the facts. For this twenty-five miles had been purchased; was controlled and operated; and existed as a part of the company's Austin branch in fact.

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The Houston Company and the Washington Company were both endowed with the capacity to make contracts, and generally to do and perform all such acts as might be necessary and proper for or incident to the fulfilment of their obligations. Act, Mar. 11, 1848, § 1, Spec. Laws, 1848, 370; Act, Feb. 2, 1856, § 2, Spec. Laws, 1856, 49. They were both required to afford the public the advantages of a continuous line. Act of Feb. 14, 1852, § 9, Spec. Laws, 1852, 142; Act of Feb. 2, 1856, § 12, Spec. Laws, 1856, 49. The acquisition of the Washington road was in accomplishment of the object of securing a line to the capital, and was not in contravention of the general intention of the legislature. The ordinances of the convention in terms ratified the transaction and reiterated the previous authority to extend to Austin. These ordinances are part of the history of the case, and reference to them in connection with the alleged scope of the particular provision of the constitution framed by that convention and submitted to the vote of the people may not improperly be made. In *Quinlan v. Houston &c. Railway Co.*, 89 Texas, 356, it was held that a convention called to frame a constitution to be submitted to a popular vote cannot pass ordinances and give them validity without submitting them to the people for ratification as part of the constitution.

These ordinances were not so submitted, and we are not called on to express any opinion as to whether in view of the anomalous circumstances under which this particular convention met; the previous decisions of the Supreme Court of the State; or any other considerations, they, or either of them, could be regarded as valid.

For irrespective of that, the act of August 15, 1870, expressly recognized and ratified the purchase of the Washington railroad and the State could not deny the validity of that which it had expressly validated, if otherwise open to question.

In *Galveston Railroad v. Cowdrey*, 11 Wall. 459, referring to a mortgage executed by a railroad company in Texas when there was no statute of that State expressly authorizing railroad companies to mortgage their roads as such, Mr. Justice Bradley, speaking for this court, said: "Without examining

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how far the operative effect of a mortgage executed by a railroad company upon its road, works and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have."

It appears to us that this purchase comes within the rule thus expressed, and that if there had originally been objection it was technical merely and removed by the act of 1870.

Now the latter act authorized no new line nor made any new grant of lands to which no previous right existed, nor restored lands which had been forfeited. If ground of forfeiture had accrued by reason of failure to complete as rapidly as required, it had not been enforced, and if outstanding was waived by the act.

If there had been a failure to construct in time so that a forfeiture would have been justified, no such forfeiture was declared by any judicial proceeding, or by any legislative action equivalent to office found. *St. Louis, Iron Mountain &c. Railway v. McGee*, 115 U. S. 469; *Bybee v. Oregon & California Railroad*, 139 U. S. 663; *Galveston, Harrisburg &c. Railway v. State*, 81 Texas, 572.

And the executive officers of the State, charged with the administration of the laws granting lands to railroads, and vested with jurisdiction to determine the facts, had ascertained and determined the facts here, and issued the certificates because in their judgment the road had been completed in accordance with the law.

No argument was made that any ground of forfeiture could be availed of in the case, nor was any such point ruled by the Court of Civil Appeals, or by the Supreme Court.

The judgment of the Court of Civil Appeals may have been rested in part on the view that the constitution of 1869 repealed all laws granting lands to railroad companies regardless of the acceptance of such laws and the construction of the lines of road thereunder.

The Supreme Court proceeded on the ground that the road from Brenham to Austin was not authorized until after 1869

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and fell into the category of a new line, and therefore the company had no right to the land grant.

From what we have said it will be perceived that we are unable to accede to either of these propositions.

In our opinion it results from the legislation and the facts that the company had the right to construct the line to Austin and earn sixteen sections per mile by so doing, prior to 1869; that by the acceptance of its charter and the subsequent legislation, and by the completion of an important part of its road before the adoption of the constitution of 1869, the company had acquired a vested right to the land grant; that the purchase of the Washington County road must be regarded as valid, and that thereby that road became part of the Austin line in operation as such before 1869; that the extension of the branch from Brenham to Austin cannot properly be treated as a new and independent line, and that there therefore was a contract between the State and the company in respect of lands earned by the construction thereof.

It follows that section 6 of Article X of the constitution of Texas as given effect by the state courts impairs the obligation of the contract and deprives the company of its property without due process of law.

Argument was also urged on behalf of defendant in error that the particular lands sued for are situated in what is known as the Pacific reservation, being a reservation for the benefit of the Texas and Pacific Railway Company, created by a special act of May 2, 1873, and hence, that though the certificates were valid, they were not located, as the law required, on unappropriated public domain.

This question was not determined by either of the appellate tribunals, but, on the contrary, their judgments rested distinctly on the invalidity of the certificates for reasons involving the disposition of Federal questions. We must decline to enter on an examination of the controversy now suggested on this point.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.